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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT HAVEN et al., Defendants and Appellants.	C074940 (Super. Ct. No. 12F01615)

According to the prosecution's theory of this case, in the rainy, early morning hours of March 28, 2012, defendant Andrew Jeffries and defendant Robert Haven lured their acquaintance, Tony Ortega, to a secluded location under the pretense that they were going to steal a car together. However, shortly after 1:00 a.m., on a rural road in Elverta, Jeffries and/or Haven shot Ortega in the back and head, killing him. Trial evidence and

testimony also implicated Jeffries's wife, defendant Wendy Fong-Jeffries,[1] in the plot to kill Ortega.

The jury found Jeffries guilty of murder in the first degree (Pen. Code, § 187, subd. (a)),[2] and found true the special circumstance that he intentionally killed Ortega by means of lying in wait (§ 190.2, subd. (a)(15)). The jury further found Jeffries guilty of possession of a firearm by a felon (§ 29800, subd. (a)(1)), willful infliction of corporal injury on Amy Quillen (§ 273.5, subd. (a)), possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and falsifying a document (§ 134). Jefferies was sentenced to life without the possibility of parole plus a consecutive determinate term of seven years.

The jury found Haven guilty of murder in the first degree (§ 187, subd. (a)) and found true the special circumstance that he intentionally killed Ortega by means of lying in wait (§ 190.2, subd. (a)(15)). The jury further found Haven guilty of possession of a firearm by a felon (two counts) (§ 29800, subd. (a)(1)), possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and falsifying a document (§ 134). Haven was sentenced to life without the possibility of parole plus a consecutive determinate term of four years.

The jury found Fong-Jeffries guilty of murder in the first degree (§ 187, subd. (a)) and found true the special circumstance that she intentionally killed Ortega by means of lying in wait (§ 190.2, subd. (a)(15)). The jury further found Fong-Jeffries guilty of

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[1] While it appears that defendant Wendy Fong-Jeffries now may prefer to go by the name Wendy Jeffries, for clarity, we refer to her as "Fong-Jeffries," while referring to defendant Andrew Jeffries as "Jeffries."

[2] Further undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

falsifying a document (§ 134). Fong-Jefferies was sentenced to life without the possibility of parole plus a consecutive determinate term of two years.

On appeal, Fong-Jeffries asserts that: (1) the evidence was legally insufficient to support the lying-in-wait special circumstance insofar as alleged against her; (2) the trial court's instruction on lying in wait allowed the jury to find that special circumstance to be true against her without proof that she knew or intended the murder to be committed by lying in wait; (3) the trial court erred in instructing the jury that she could be guilty under an uncharged conspiracy theory of liability; (4) her conviction of murder must be reversed because the prosecution presented insufficient corroboration of incriminating accomplice testimony; (5) the trial court's instructions to the jury on accomplice testimony undermined her credibility and thus, deprived her of her right to testify and present a complete defense; and (6) the cumulative effect of these errors deprived her of a fair trial. We reject Fong-Jeffries's claims.

Haven contends: (1) that the trial court erred in denying his motion pursuant to section 1538.5 to suppress the fruits of law enforcement's warrantless search of the apartment in which he was arrested based on their erroneous belief that a probationer with a search condition resided in the apartment, and, (2) joining in Fong-Jeffries's argument, that the trial court erred in instructing the jury on an uncharged conspiracy theory of liability. We conclude that, even if law enforcement violated Haven's Fourth Amendment rights in conducting the probation search which led to Haven's arrest and subsequently the discovery of certain evidence, under the circumstances of this case, law enforcement cannot be deemed to have engaged in deliberate, reckless, or even grossly negligent conduct, triggering application of the exclusionary rule. We also conclude, as we do with regard to Fong-Jeffries's claim, that the contention regarding the uncharged conspiracy theory of liability is without merit.

Jeffries asserts: (1) that the California Supreme Court, in effect, created a new, lesser included offense of second degree murder based on aiding and abetting a lesser

crime, and that the trial court erred in failing to instruct the jury on the natural and probable consequences doctrine consistent with this theory of liability; (2) that the trial court abused its discretion in admitting evidence of a prior incident of domestic violence, and that the admission of this evidence deprived him of a fair trial; (3) that the admission of evidence of uncharged acts as propensity evidence under Evidence Code section 1109 violates the due process and equal protection guarantees of the Fourteenth Amendment; and, (4) joining in Fong-Jeffries's argument, that the trial court's instruction on lying in wait allowed the jury to find that special circumstance to be true as to him without proof that he knew or intended the murder to be committed by lying in wait and that the trial court erred in instructing the jury that he could be guilty under an uncharged conspiracy theory of liability. We conclude that Jeffries's claims are without merit.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The People's Case

Amy Quillen and Jeffries had two children together. Quillen testified that, shortly after her oldest child was born, she and Jeffries began selling methamphetamine.[3] A supplier named Bianca would drop off one to two ounces of methamphetamine every week or two.

According to Quillen, her relationship with Jeffries "had its ups and downs," and there were times when he was abusive. In 2007, Jeffries beat Quillen, punched her legs and back, head-butted her, and dragged her by her hair. Quillen sustained bruises on her leg and back. Jeffries also threatened Quillen with a gun. Quillen contacted the police, and officers arrested Jeffries. Police officers photographed Quillen's injuries, and the photographs were admitted at trial. Quillen and Jeffries separated and reconciled several

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[3] Quillen testified under a grant of immunity.

times. Eventually, they moved into an apartment at 2687 Altos Avenue, where they continued to sell methamphetamine.

In 2011, Jeffries informed Quillen that he had discovered that he and Fong-Jeffries had a daughter together. Quillen suspected that Jeffries and Fong-Jeffries were renewing their relationship. Quillen left Jeffries, and a custody battle ensued. Quillen again reconciled and moved back in with Jeffries.

At some point after Quillen moved back in, she observed that there were guns in the apartment. She recalled seeing a silver .357-caliber handgun with a wooden handle which had initials carved into it. Quillen also recalled seeing a longer black gun with a banana clip in the apartment.

At some point, various people began living with Jeffries and Quillen. First, Theresa Wilkey and Tony Ortega, methamphetamine users Quillen met through Jeffries, moved into the apartment. Jeffries and Quillen supplied Ortega and Wilkey with methamphetamine. Later, Thad Curtis and Granvil Smith lived in the apartment.

By the end of 2011, Quillen's relationship with Jeffries was "terrible." Beginning on or about January 4, 2012,[4] Quillen secretly developed a closer relationship with Ortega. They became intimate.

Sometime between January and February, Quillen learned that Jeffries was aware of her relationship with Ortega. Jeffries called Quillen and said, "you're dead, bitch," and then hung up. Later, Jeffries came home, burst through the door, and immediately started hitting Quillen, who was sitting on the couch with her youngest son on her lap. Wilkey took the boy to another room while Jeffries continued to strike Quillen. Jeffries stood Quillen up and told her that they were going to talk to Ortega. Jeffries drove

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[4] Unless otherwise noted, all dates are in the year 2012.

Quillen to a field, and, during the drive, he told her that, if it was true, he was going to shoot her "execution style." He told her that he had a gun underneath the car seat.

When they arrived and got out of the vehicle, Ortega was standing in the middle of the field. Ortega yelled, "[I]t's true, it's true, I'm not lying, I'm not lying." Jeffries turned around, walked to the truck, and began to drive away. Quillen told Ortega to tell Jeffries that he was "whacked out or something . . ." because Jeffries was going to kill them. Ortega flagged Jeffries down as he was driving away and told Jeffries that he did not know what he was thinking. Jeffries responded by saying, "[T]hat's all you have to say," or something similar. Ortega and Quillen got back in the vehicle, and they all went home. Quillen, however, suspected that Jeffries did not believe them.

On the night of February 28, Quillen awoke to Jeffries punching her in the head. He was saying that he hated her, and that he had reviewed the contents of her phone. He had found a text message from Quillen to Ortega, in which she said that she "needed to feel his touch." Jeffries called Quillen a lying bitch, and said, "he knew it was true." He continued to strike her on the head, side, and leg. The assault moved from the bedroom into the living room, where Jeffries pushed Quillen over a couch. Jeffries attempted to strike Quillen with a baseball bat, but Curtis grabbed the bat and told Jeffries that he needed to stop or he would go to jail. Jeffries told Smith not to let Quillen leave the apartment, and Jeffries and Curtis went out. When they returned, Quillen heard Jeffries say that they had found Ortega, and that he had said "it was true again." Curtis said to Jeffries, "[Y]ou call the shots. Whatever you want done, it's done." Quillen assumed that they were going to kill her and Ortega. Jeffries told Quillen that, the next morning, he was going to ask their eldest son if he had ever seen Quillen intimate with Ortega, and if he said yes, Jeffries would kill her. After telling Curtis and Smith to keep an eye on Quillen and not let her leave or call anyone, Jeffries went to sleep. Several hours later, Quillen found Jeffries's phone, went into the bathroom, locked the door, turned on the

water, and climbed out a window. She went to a neighbor's apartment and called the police.

On February 29, Officer Christopher Shippen took a statement from Quillen. Shippen observed an injury to the lower left side of Quillen's face, an abrasion by her mouth, swelling on her cheek, and a small cut inside her mouth.

Officers Chris Baptista and Michael Boyd went to 2687 Altos Avenue, apartment 1. Smith answered the door and allowed police in. Officer Boyd spoke with Jeffries in a back room, and then arrested him. As Jeffries was being escorted from the apartment, he asked for something warmer to wear. Boyd retrieved a sweatshirt from the bedroom door handle. According to Boyd, before giving the sweatshirt to Jeffries, he checked it to make sure it did not contain any contraband or weapons. Police also arrested Smith and Curtis.

As Jeffries was being processed in the booking area of the police station, Boyd discovered that Jeffries had a piece of plastic in his hand which, to Boyd, appeared to contain a controlled substance. The parties stipulated that narcotics booked into evidence by Boyd on February 29, contained 2.42 grams of methamphetamine.

Fong-Jeffries bailed Jeffries out of jail and immediately moved in with him in the Altos Avenue apartment. However, Jeffries told others in text messages that he wanted to be with Quillen, not Fong-Jeffries, and he blamed Ortega and Wilkey for the troubles in his relationship with Quillen. Jeffries repeatedly sent messages to Quillen, directly and indirectly, seeking to reconcile.

Jeffries began to spend a significant amount of time with defendant Haven, a methamphetamine customer of Jeffries's who knew Fong-Jeffries from childhood. Haven began to assist Jeffries with his methamphetamine-dealing enterprise.

Concomitantly, on or around March 18, Jeffries began using and texting from a new mobile number, and Haven began to use Jeffries's old number.[5]

In a text message exchange on March 19, Jeffries asked Haven when he was going to get Ortega, and urged Haven to find him. Subsequently, Haven indicated that he was at Ortega's mother's house, but there was no answer. Jeffries asked Haven if he thought he was "getting played," and Haven responded that he thought Ortega was just "out doing something stupid . . ." like "[l]ooking for a car." Jeffries continued to express suspicion that Ortega was going to "fuck [him] over . . . ," and Haven responded, "All we can do is watch him and see how he acts. And if he even looks like he's going to try to fuck you over, I give you my word I'm going to take him down, any means necessary."[6]

On March 21, Jeffries texted to Stephanie Engel, "[M]y family is fucked and I ain't no punk [I] miss my girl and [I] am just furious." As the exchange continued, Engel urged Jeffries to calm down, and stated, "[E]verything needs a plan that you can handle with class. Isn't that what you tried to teach me?" Jeffries responded, "No, it ain't, because Theresa manipulates and lies still, and Tony is up to something." When Engel asked what Jeffries was "doing with him," Jeffries responded, "Class is out the window. And it will be broadcasted what Amy and my family mean to me very soon." He continued, "Just think old Italian mafia style. I love her and now I'm going to show it at the ultimate." Jeffries texted, "[N]ow they fucked with my heart and it's heart check time." He further texted, "[S]he'll never doubt my feelings for her again."

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[5] At trial, the text messages were discussed as being exchanged between specified telephone numbers rather than individuals. However, the parties do not dispute on appeal the identity of those exchanging the text messages.

[6] There are occasional, very minor, discrepancies between the language actually texted, and that transcribed by the court reporter as witnesses and attorneys read the text messages at trial. These discrepancies have no significance with regard to any issue on appeal.

On March 22, Engel asked Jeffries if he ever met up with Ortega, and Jeffries responded that Ortega was "avoiding real weird like . . . ." He clarified, "He's just up -- he's just up and runs off, and it's just weird." Engel responded, "So the problem is he isn't trusting you, right? He did go for that drive in your truck, right," and Jeffries replied, "Yeah, I think so, but I got him. It will happen. Know that."

On March 23, texts from Haven indicated that he was in a truck with Ortega and Dustin Cook. Haven texted Jeffries that they were getting gas and that they would be there in a minute. He then reported: "Dustin said he thinks Tony got something hella heavy on him, might be a gun. Tony dropped it on the floor of the truck." He then clarified, "He's got it on him. He picked it up. It's in his pants." Within an hour of that exchange, Fong-Jeffries texted Haven, "Please be safe, okay?" Later, Haven texted to Keith Davenport: "We were picking up Tony on the way to your place. All the sudden Tony like flipped out, got paranoid and took off walking." He continued, "You ever heard of the saying, keep your friends close, but keep your enemies closer?" Haven subsequently texted to Davenport: "This shit with Tony is about keeping the family protected." Haven then texted Jeffries that Ortega was "nowhere to be found," and, "[l]et me know when to come out. I'll do it right here if need be." Jeffries texted Engel that "the first one's in motion," and that "[i]f all goes well, two to go." After Engel cautioned Jeffries to be careful, he responded, "I need my baby back, so I'm going to show what she means to me. She questioned this one time." Jeffries continued, "And shit like this turns her on. LOL. Yeah, if I'd ever do that for or over her." However, Jeffries subsequently texted Engel, "God damn this mother fucker." Engel asked, "Avoid it?" to which Jeffries responded, "Fuck yes."

On March 24, Jeffries sent a series of text messages to the number of Ortega's mother, Cheryl Cook,[7] apparently trying to contact Ortega. Jeffries texted, "Tony, what's up? Hit me back." "You want to make this money or not, bro?" "Hey, I can't wait all night, bro. I'm going in the next hour, so hit me up." "Hey, I get it, bro, don't trip. You asked me to help you come up. I try to help and you blow me off. Thanks, dawg."

On March 25, Jeffries texted Haven, "You ready?" When Haven responded that he was, Jeffries replied, "Have the backpack. Going to test-run." Haven texted, "Dusty can grab it for me out of the truck. The piece is on me."

Later on the same day, Haven texted Cheryl's number, stating, "Hey, Tony, it's Robby. Seeing if you home. I was going to come by and see if you wanted to smoke."

On March 26, Haven texted Jeffries, "Ready whenever you are. And are we taking Dustin?" Jeffries responded, "Your call." Haven replied, "I say take him. I know we can trust him. Text me when you're ready." Later, after texting Cheryl's number stating, "[W]e'll be leaving in a few minutes to pick you up." Haven texted Jeffries, "What's up? He's gone." Jeffries responded, "Are you fucking serious?" After Haven asked for instructions, Jeffries asked where he went. Haven responded, "That mother fucker knows something is up. I called to check on him. He was tripping, saying something about you can't outshine the shiner." Jeffries then texted to Cheryl's phone: "Tony, what's up, bro? Did I miss something? Have I done something wrong? I'd like to know." Ortega texted back, "Are you really going there, bro? It's not just you, homeboy. It's everyone, dude." Later in the evening, Jeffries again texted Cheryl's number, "Hey, Tony, hit me up. I got a few more jobs . . . ."

Also on March 26, Haven texted Fong-Jeffries, and asked her, "[C]an you possibly get me a box of what we talked about the other night and bring it home tonight and I'll

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[7] We refer to Cheryl Cook and Dustin Cook (no apparent relation) by their first names to avoid confusion.

pay you back when you get here. I just need one box." Fong-Jeffries responded that she could "get them this afternoon," and Haven explained, "It's just with everything going on, I feel more comfortable having more to sit. feel me?" Haven then told Fong-Jeffries that he believed that Curtis was attempting to "turn some of the other brothers against" Jeffries. Haven stated, "I will not let anything happen to [Jeffries], you or the kids." After Fong-Jeffries thanked Haven for "everything you do," Haven responded, "I will eliminate these obstacles in our way. I'm done playing with him and Tony." Fong-Jeffries stated that matters would "be much better for [Jeffries] once this whole situation is resolved." She subsequently stated: "[O]nce Tony's done, Theresa's going to have to be done quick." Haven responded, "Yeah, I know she'll be. I put [Curtis] on the list as well." Fong-Jeffries replied, "Yeah, [Curtis] needs to be on the list." When Fong-Jeffries expressed her concern over the possibility that Jeffries could have to "do . . . time," presumably based on the charges involving Quillen, Haven reassured her that he would help, stating, "You guys are my family. You are never a burden. It's my honor to ride side by side with you guys. I love all you guys. I will give my life to protect you guys. I don't have people like you and [Jeffries] in my life, people that I call family. And I just got you back into my life. I thank God every day for that." Fong-Jeffries again reassured Haven she would get a box for him.

Haven again texted Cheryl's number, stating: "Tony, it's Robby. You going to be ready when we call? It will be a little after ten."

The following day, March 27, Haven texted Cheryl's phone, and asked her if Ortega was around, and to have him call Haven. Haven then texted Fong-Jeffries and stated that he needed to use her car that night. Fong-Jeffries expressed reluctance, stating: "I need to know what [Jeffries] says because I'm not going to do anything to piss him off." Haven assured her that Jeffries had been amenable the prior evening when he mentioned it, and stated, "[R]egardless, our Tony problems end tonight." Fong-Jeffries replied, "I want to make sure [Jeffries] is still good with that. If you take my car, please

be careful. I can't afford to get another one." Haven then stated, "Me and [Jeffries] think Tony tried to sabotage the truck." He later stated, "[W]hen it comes to Tony, his luck ends tonight. You have my word on that." Fong-Jeffries replied, "Okay. This definitely needs to come to an end. I also want to be careful. I'm seriously mad enough to do something that could get me in trouble." Haven responded, "I got this. But you guys have to let me do it my way. This trying to be his friend and help him shit ain't working." As the exchange concluded, Fong-Jeffries texted Haven: "Erase these messages, please."

Again on March 27, Jeffries texted Haven, "Job tonight." Haven asked who was going, and whether Jeffries was going. When Jeffries responded that Ortega was going, Haven responded, "I know Tony's going. What I'm asking is, are you going or should I take Dustin? He said he'd ride all the way. I trust him." When Jeffries stated that it was Haven's call, Haven responded, "I asked him. He says he's with the bis."

Stephanie Anton testified that, on March 27, between 4:00 and 5:00 p.m., she saw a big, silver revolver on the coffee table of Jeffries's apartment. She also testified that she saw Jeffries with the gun stashed in his waistband at his back when he was either in the living room or exiting the apartment. Thereafter, Anton went to the apartment upstairs to get high. While she was there, she saw Jeffries's vehicle in the parking lot. At trial, she testified that she was not sure who was driving the vehicle, but she testified that, in a police interview in April, she stated that, after Jeffries left the apartment with the gun, she saw his vehicle arrive and saw that Haven was driving.

Cheryl testified that the last time she saw Ortega alive was at her apartment between 8:00 and 9:00 p.m. on March 27. Ortega was with Jeffries and Haven. Ortega and Haven smoked methamphetamine together. Jeffries, Haven, and Ortega then left.

At approximately 11:29 p.m., Haven texted Jeffries, "Next spot [I]'m doin[g] him." Approximately 45 minutes later, Jeffries texted Haven, "Kickin[g] his ass," and Haven later responded, "Beatin[g] the brakes off this lame."

Shortly after 1:00 a.m. on March 28, Jerry Wenger was sleeping in his home on Kasser Road when he awoke to the sound of several loud bangs. After failing to determine what caused the sound, Jerry and his wife Rebecca went back to sleep.

In the early morning hours of March 28, Jenifer Fassett was "ghost hunting" with friends near Kasser Road. When Fassett turned onto Kasser Road, she observed something in the street she believed to be an animal. She quickly realized, however, that it was a person. The individual's face was "scratched up." Fassett started to drive away, but one of her friends convinced her to go back. They drove by the person again, and one of Fassett's friends called 911. Fassett and her friends waited nearby for police to arrive.

Detective Jeffrey Wallace responded to the Kasser Road location at approximately 4:00 a.m. Wallace observed Ortega's body, lying flat on his back on the shoulder of the road, partially in a drainage ditch. Ortega had bullet wounds on his left palm, his left cheek, on the left side of his forehead, in the middle of his chest and back, and on his right forearm. A bottle of pepper spray was clutched in his hand. Near the body, officers found a key chain with two Honda keys that were shaved down, of the type employed by car thieves. A window punch, used to break car windows or other types of glass, was discovered in Ortega's pocket. Wallace did not locate any cartridge cases at the scene.

The pathologist who performed the autopsy on Ortega testified that a bullet entered Ortega's back between his shoulder blades traveled into his chest, broke a couple of ribs and punctured a lung, and exited Ortega's chest at the base of his neck. This was a fatal wound. Ortega also had a gunshot wound on his right forearm. Additionally, a bullet entered the back of Ortega's hand and came out the palm of his hand. The tips of Ortega's middle and ring fingers were injured, suggesting that Ortega's hands were "curled" when he was shot. The physician also theorized, based on the irregular shape of the wound to Ortega's forearm, that the bullet which caused that wound may have struck something else first, perhaps Ortega's right hand. Finally, Ortega had a gunshot wound to the right side of his face over his cheekbone. The bullet passed through Ortega's right

eye socket, behind the nose, and exited the left side of his face. One wound could have been a reentry wound, so Ortega was shot either three or four times.

Late in the morning of March 28, Fong-Jeffries texted Haven to wake him up. Fong-Jeffries asked, "Did everything go as planned? I haven't been able to talk to [Jeffries] about anything yet." Haven responded, "You, [Jeffries] and the kids are a little bit safer now. The security system has been tightened up. I told you I'd fix it. Feel me?" Fong-Jeffries replied, "Thank you. It means a lot to me, everything that you do." Haven then asked whether he could ask a "dumb question." Haven texted, "I already know the answer but [I] just need to hear it ok. I can trust [Jeffries] right[?] I mean [you] know to hav[e] my ba[c]k[?] Please don[']t b[e] mad at me for askin[g]." Fong-Jeffries responded, "I'm not mad. Yes, he will always have your back. He loves you. You have been there for him and he'll be there for you. The only way things would change would be if you fucked him over, which we both know would not happen. What's making you stress on that? Did something happen or was something said?" Haven responded that nothing happened. He texted, "[L]ike [I] told him last night [I] would do anything last night. I love [Jeffries]. I just wanted to hear it [you] feel me." Haven subsequently texted, "Hey [you] know [Jeffries] was on the phone last night. He was talkin[g] [a]bout me & he called me his ace duce [*sic*] & his kid. It made me feel so good." He then texted, "I love you, Wendy. I would do anything for you guys." When Fong-Jeffries texted that she hoped Haven realized that the loyalty "goes both ways," Haven responded, "I do know that. Otherwise, I wouldn't have done what I did. You know, I'm [Jeffries's] kid, remember?" Haven then texted Fong-Jeffries that he needed another "toy." Fong-Jeffries replied that she had to take a test before she could buy anything, and that they would have to "see what you want and price it out." Haven responded that he could "take one off the street, it don't matter." Fong-Jeffries responded, "we're going to have to find one. You talk to [Jeffries] about it?"

Bianca Villanueva testified that she used to sell large quantities of methamphetamine to Jeffries.[8] Occasionally, Villanueva would conduct these transactions with Haven if Jeffries was unavailable. Towards the end of their business relationship, Jeffries occasionally paid Villanueva with items other than cash. Jeffries had paid Villanueva with two guns, a computer, and ammunition. Villanueva testified that, at one point, Jeffries had told her that he had a particular gun for her as well as a sum of money. On the morning of March 28, when Villanueva woke up, she discovered that she had multiple missed calls from both Jeffries and Haven, who had been calling her "all night." Eventually, Haven called her again and stated that Jeffries wanted her to come to his apartment. She then got a ride from a friend and went to the apartment to pick up the gun. Jeffries gave Villanueva a .357-caliber handgun. Both Jeffries and Haven seemed to take care not to touch the gun with their bare fingers; it was wrapped in a shirt. Villanueva placed that gun in a safe in her storage unit, where she also stored a box of 50 rounds of ammunition that Jeffries gave her.

Dustin Cook was a methamphetamine user who obtained drugs from Jeffries or Haven.[9] Dustin performed errands for Jeffries and Haven in exchange for methamphetamine, including delivering drugs and collecting money. Dustin testified that, one day while he was in one of the apartments at Altos Avenue, Haven stated that he needed to speak with him in the bathroom. Haven then told Dustin that the "issue with Tony is done." Dustin asked what Haven meant, and Haven responded, "Tony, I took care of him." Dustin continued to express confusion, and Haven then told Dustin that he shot Ortega. As he was speaking, Haven pulled a handgun from his waistband and set it on his lap. Haven told Dustin that he and Ortega got out of a car, and Haven walked up

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[8] Villanueva testified under a grant of immunity.

[9] Dustin Cook also testified under a grant of immunity.

behind Ortega and shot him three times in his back. Jeffries had remained in the car. After Haven told Dustin about the shooting, Haven, with the gun still on his lap, asked Dustin, "You ain't going to turn on me, are you?" Dustin told the jury that, after Jeffries was arrested, Fong-Jeffries asked him to testify that Jeffries was at home at the relevant time. She also asked him to testify that Jeffries had gone with her to Yuba City.

On April 11, Fong-Jeffries texted Jeffries, "I typed up the letter. How many copies do you think I should make? I got the address for the District Attorney's office." She subsequently texted Jeffries, "Dustin is coming down with the signatures for you. I'm telling you, Dustin got it down." Quillen testified that she neither wrote nor signed a letter which was sent to the district attorney's office, People's Exhibit number 12, in which someone purporting to be Quillen requested that the domestic violence charges against Jeffries be dropped.

On April 13, Officer Robert Young participated in a search of apartment 2 at 2687 Altos Avenue. Young detained Haven in the kitchen. Young asked Haven if he had any weapons, and Haven responded, "It's on my hip." Young searched Haven and found a loaded nine-millimeter handgun as well as a small amount of methamphetamine on Haven's person. Upon running the serial number for the gun, Young learned that it was registered to a Buck L. Fong in Woodland. The parties stipulated that the narcotics booked into evidence by Young on April 13, contained .65 grams of methamphetamine.

On April 14, Detective Tom McCue searched Villanueva's storage unit. Among other items, McCue found a safe which contained approximately one ounce of methamphetamine, a .357-caliber Taurus handgun, and a box of .357-caliber bullets with four rounds missing. Forensic analysis revealed that a bullet jacket recovered during Ortega's autopsy matched bullets test fired from the gun.

Detectives picked up Villanueva three days later. After she learned that her storage unit had been searched, Villanueva contacted Jeffries. She informed him that

police seized the guns and drugs in her storage unit. Jeffries told her to tell police that she acquired the guns from some "pisos," or Mexicans.

Defendant Jeffries's Case

Shayleen Leary, Jeffries and Fong-Jeffries's 18-year-old daughter, testified that, on March 27, she was at the apartment on Altos Avenue, and she was sick. Jeffries went out to do some errands, and he arrived home at 11:30 p.m. Leary saw Jeffries come home, and he did not go out again. Leary was on the living room couch, and anyone leaving the apartment would have had to pass her to exit. Jeffries was still at the apartment when Leary awoke in the morning. Leary never saw Jeffries with a gun.

Desiree Dynes, Jeffries's best friend and a friend of Haven, testified that, on the night of March 27, she was having problems with her former husband. At approximately midnight, she went to the apartments on Altos Avenue, where she saw Jeffries in his apartment. Dynes then hung out with the people who lived in the apartment upstairs until approximately 6:00 a.m. During that time, she sat on the exterior stairs. According to Dynes, Jeffries was home during this entire time.

Vic Arneson lived in one of the apartments on Altos Avenue. Arneson testified that Haven told him, "he handled Tony." Haven stated that "no one fucks with my family." Jeffries's name never came up.

Theodore McQueen testified that Haven began staying with him in his apartment on Altos Avenue a little before March.[10] One night, at approximately 3:00 or 3:30 a.m., Haven asked McQueen to "get rid of some stuff for him . . . .." McQueen placed clothing Haven gave him in a bag, rode his bike down to the river, poured lighter fluid on the bag, and set it on fire. McQueen also testified that Haven asked how to remove gunshot residue from one's hands. McQueen told him how to remove gunshot residue, and had

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[10] McQueen testified under a grant of immunity.

his girlfriend get the materials required. McQueen testified that he had seen Haven with a gun on two or three separate occasions. He saw Haven with a black semi-automatic pistol on the day that Haven was arrested for possession of methamphetamine. Approximately one to two weeks earlier, he had seen Haven with a revolver.

Granvil Smith testified that, on February 29, he was in Jeffries's apartment on Altos Avenue when he was arrested. Smith had seen Ortega at that apartment on the evening of February 28. Ortega took bundles of methamphetamine out of his black windbreaker, gave Smith two, and placed one back in his pocket. The next day, police arrived at the apartment and woke Jeffries. Jeffries came out of his bedroom with no shirt on, and he asked the arresting officers if he could get a shirt. One of the officers grabbed Ortega's black windbreaker off of the couch, threw it over Jeffries's shoulder, and placed Jeffries in the police car. Smith testified that Jeffries was not present when Ortega shared his methamphetamine with Smith, and Jeffries would have no reason to know that there were drugs in the windbreaker.

Defendant Fong-Jeffries's Case

Fong-Jeffries testified about the various text messages. She testified that, when Haven asked her in a text message for "a box of what we talked about the other night," he was referring to ammunition. On cross-examination, Fong-Jeffries testified that, when Haven asked for ammunition, she did not know that he intended to use the .357-caliber handgun to shoot Ortega. Haven had not told her what the ammunition was for, only that he "had problems with people and he was concerned with his well-being." She testified on cross-examination that Curtis had threatened Haven's life.

Fong-Jeffries testified that, when, in text messages, she stated that matters would be better for Jeffries when "this whole situation is resolved," she was referring to people, including Ortega and Curtis, using Jeffries for money and drugs. She further testified that, when she texted that, once Ortega is done, "Teresa is going to have to be done quick," she was referring to cutting them off. Further, when Haven texted Fong-Jeffries

that their "Tony problems end tonight . . . .," she believed that Haven intended to "confront [Ortega] and basically kick his ass and tell him to stay away." Thereafter, she thought Ortega would no longer "com[e] around and mooch[] off of [Jeffries]." Additionally, when Haven texted her, "That dope fiend piece of shit. When it comes to Tony, his luck ends tonight. You have my word on that," she believed Haven was indicating that he was cutting Ortega off and that he would no longer be lucky enough to get things from Jeffries. She testified that when she texted Haven to ask him "if everything went as planned last night," she was referring to the installation of security cameras.

Fong-Jeffries further testified that when Haven texted her that he needed a new toy, he was referring to a gun. She testified that a gun found on Haven was registered to her father, Buck Fong. She told the jury that Haven had wanted to buy the gun, but she had not wanted to sell it to him. She did not discover that the gun was missing from her car until after Haven was arrested.

Fong-Jeffries admitted that she prepared the retraction letter that was eventually sent to the district attorney's office purportedly by Quillen. However, she did not sign it.

On cross-examination, Fong-Jeffries explained that she had asked Haven to delete all of the text messages because the people discussed in those messages were Jeffries's friends, and, while she did not want them around, she also did not want to fight with Jeffries about them.

Fong-Jeffries testified that, while Jeffries "didn't think it was cool . . . that [Ortega] had gotten with his ex," he did not particularly care that Ortega had slept with Quillen. Fong-Jeffries explained that, by that time, Jeffries was with her. She also testified on cross-examination that Jeffries told her that "he was sending texts out to people about how much he loved Amy Quillen just to track her to serve a restraining order." According to Fong-Jeffries, they deliberately "made it seem like we had split up just so we could find out where she was."

On cross-examination, Fong-Jeffries testified that, when she was arrested on June 13, she told detectives that Haven had told her he shot Ortega. She acknowledged that she never told law enforcement about this admission between April 25, and her arrest on June 13, during which time Jeffries was in custody for Ortega's murder.

Defendant Haven's Case

Haven testified that he did not kill Ortega. Rather, on March 28, he witnessed Jeffries kill Ortega.

Haven testified that, during the time he was staying in an abandoned house across the street from the Altos Avenue apartments, Jeffries came over holding a baseball bat, accompanied by Curtis. He demanded to know where Ortega was. Jeffries saw Ortega and "went at [him] with the baseball bat." However, Curtis "wrapped him up" and urged Jeffries not to "do this here." Jeffries yelled at Ortega, accusing him of sleeping with or trying to sleep with Quillen. Ortega claimed that Quillen had hit on him, but that he never touched her. They all agreed to return to Jeffries's apartment and confront Quillen. Jeffries, Ortega, and Curtis all left. Fifteen to 20 minutes later, Curtis returned to the abandoned house where Haven was and asked if Ortega had come back, and Haven responded that he had not. Later that night, Haven saw Ortega with a .32-caliber gun.

The next day, Haven observed law enforcement officers at the Altos Avenue apartments. After the officers left, Haven went to the apartment complex and found out what had happened. Fong-Jeffries's name came up during the conversation. Haven had known Fong-Jeffries since childhood, as their mothers were close friends. When he was 13, Haven's family moved out of the neighborhood, and Haven and Fong-Jeffries fell out of touch for years. When her name arose, Haven told the person with whom he was speaking to tell him when she came over so that he could speak to her.

Later, someone notified Haven that Fong-Jeffries was moving into the apartment complex. Haven recommended a particular bail bonds agent to Fong-Jeffries. He also went with her to meet with the agent and pay him. Later that night, Jeffries returned

home. As Haven was leaving the apartment complex that night, he told Jeffries that he would be happy to help him with anything he needed.

After this, Haven's relationship with Jeffries changed. A couple of days later, Jeffries asked Haven to watch his apartment while he was gone. Then he asked him to watch his older son a couple of times. Haven started helping keep the house in order. Approximately one week after Jeffries's release from jail, Haven became involved in Jeffries's drug business. Haven offered to sell methamphetamine for him. From that point on, if Jeffries was not home, Haven would "take care of the business." He also began to make runs for Jeffries, dropping off product or picking up money. He would also meet with a supplier. Jeffries paid Haven in methamphetamine, as well as some cash.

At the beginning of March, Haven moved from the abandoned house to the Altos Avenue apartment directly above Jeffries's apartment. Jeffries provided Haven with a mobile phone. Initially, Jeffries allowed a number of people to use that phone. At some point between March 19 and 22, however, that phone was mostly in Haven's possession.

In mid-March, after having spent some time away from the area, Ortega started coming around the Altos Avenue apartment complex again. However, he would stop by very briefly, but would never stay long. Then he began to accompany Jeffries and Haven on trips they took out of town looking for Quillen. At first, it struck Haven as odd that Jeffries was spending time with Ortega again. At one point, Haven asked Jeffries why he was renewing acquaintances with Ortega, under the circumstances. Jeffries responded that Ortega had agreed to help him find Quillen and bring her home.

Haven acknowledged several text messages between him and Jeffries discussing whether Jeffries should trust Ortega. These included the message Haven sent to Jeffries in which he stated: "if he even looks like he's gonna try to fuck you over I give you my word I'm gonna take him down any means necessary." Haven explained that, if Ortega

attempted to cross Jeffries, he would handle it, by which he meant "[a]t the most beating him up."

On March 19, Jeffries and Haven were coming from court on Power Inn Road in Jeffries's Yukon. Suddenly, the left front tire turned straight to the left, and the Yukon spun around. Once they managed to get the vehicle off of the road, Haven inspected it and saw that the tie rod had come apart. Upon closer inspection, Haven saw that the nut securing the tie rod was missing. Haven performed a temporary repair so that they could drive back to Altos Avenue, where Haven worked more extensively on the vehicle.

After the incident, Jeffries told Haven that he believed Ortega had tampered with the Yukon. Haven confirmed that the particular way in which the tie rod assembly had failed was not a defect that would arise from road vibration or other normal wear and tear. Haven agreed that someone had tried to sabotage the truck and thought Curtis could have been the person, because Curtis was upset that Jeffries was no longer allowing him to stay at his apartment.

Haven began to perceive Ortega as a threat. In addition to the incident involving the Yukon, Jeffries told Haven that Ortega was jealous of Haven, and angry that Haven had essentially usurped his position of influence with Jeffries. On one occasion, Jeffries and Ortega were riding in the front of Jeffries's Yukon while Haven was in the back. Ortega was upset about the situation between him and Jeffries. Ortega looked at Haven and said to Jeffries, "Now you're riding around with this fucking guy?" Jeffries told Haven that Ortega wanted Haven out of the picture, and that he would use any means necessary.

At some point, Jeffries began to talk about "taking [Ortega] out." At first, when Jeffries began to talk this way in relation to the situation with Quillen, Haven did not believe that Jeffries was serious. However, he later came to believe that Jeffries's desire to have Ortega killed was genuine. Additionally, Haven spoke with Jeffries about the

possibility of Haven killing Ortega because Haven was genuinely concerned that Ortega was going to kill him first.

Haven agreed to help Jeffries kill Ortega. (6 RT 1726) He did not agree because Ortega had a relationship with Quillen, and he did not agree merely to help Jeffries. He told the jury he did it because he felt that Ortega was a threat to his life.

Jeffries proposed that they lure Ortega out on jobs, such as stealing cars, so that Haven could shoot him. Haven agreed. After prior attempts to lure Ortega out failed, on March 27, Haven and Jeffries drove to Ortega's mother's apartment in Fong-Jeffries's car to pick Ortega up. Haven testified that he did not know whether Jeffries was armed. They stayed at Ortega's mother's apartment for approximately 20 or 25 minutes. Haven smoked methamphetamine with Ortega. Thereafter, Haven, Jeffries, and Ortega left to look for a "pot farm" Ortega knew of. After they were frustrated in their plan to steal marijuana plants, Ortega became despondent, as he needed money and a car. Haven indicated that he had shaved keys at his apartment, so they went and retrieved the shaved keys, and Haven gave them to Ortega. Ortega and Haven smoked again. They then drove off looking for a car to steal.

At one point, Haven and Ortega exited the vehicle and walked up towards a driveway. However, Haven told Ortega he thought he saw someone on the porch. When asked if it was Haven's plan to actually steal a car from that property, Haven responded that "[i]n a way it was something different." He clarified, "It was one of the opportunities that I had to shoot . . . Ortega." Haven also admitted that, at this time, he texted Jeffries, "Next spot I'm doing him." Haven stated that "at that time that was [his] . . . plan." According to Haven, he then texted, "Beating the brakes off this lame." By sending this text, Haven's intention was to cover up the fact, suggested by his prior text, that he planned to shoot Ortega.

At some point during the night, Haven changed his mind about shooting Ortega. He testified that he had the opportunity to shoot Ortega when they were attempting to

steal marijuana plants, but he decided not to because he was not a killer. He also had the opportunity to shoot Ortega near the house where they planned to steal a car, but, again, he did not do so. Later, in a more remote area in Elverta, Haven had the opportunity to shoot Ortega when all three got out of the car to urinate. However, he did not shoot Ortega. Thereafter, they drove for 15 to 20 minutes until they arrived at Kasser Road.

They approached the Wenger residence on Kasser Road and drove by slowly. They made a U-turn and stopped on the road between the Wenger residence and the next house. All three exited the vehicle. Haven walked beside Ortega, and they shared a cigarette. Haven then heard a gunshot. He turned around and saw Jeffries walking towards Ortega firing a gun at him. Haven heard Jeffries fire three rounds. Haven then looked at Ortega and saw him spin around and fall down backwards. After Jeffries shot Ortega, he told Haven to "get in the fucking car." Haven did, and they left.

Haven testified that, at some point prior to the shooting, he had stopped wanting Ortega dead. While he had wanted Ortega dead at one point because he thought Ortega was going to kill him, eventually, he either changed his mind or could not do it.

As they drove back to the Altos Avenue apartments after the shooting, Haven and Jeffries both attempted to contact Villanueva because Jeffries's plan was to give her the gun. Having failed to reach Villanueva, Jeffries instructed Haven to give the gun to Ricky Chesser until they could get it to Villanueva. Jeffries told Haven that, if he was questioned by police, he was to say that they had been out in Jeffries's Yukon and it broke down on Roseville Road. Therefore, they had to walk to Jeffries's friend Keith Davenport's house so that he could help them fix the truck and get home. When asked why he went along with Jeffries in telling this cover story, Haven stated that he was scared of Jeffries, because he had "just watched him blow somebody away, [and] [he] didn't want to be next." Jeffries also asked Haven if he knew how to get rid of gunshot residue, and Haven responded that he would try to find out.

Back at the Altos Avenue apartments, Jeffries gave Haven the .357. Haven wrapped it in a red shirt and gave it to Chesser and told him to hang onto it. Haven asked McQueen if he could borrow some clothes, and he also asked him to take the clothes he had been wearing and burn them. Haven also asked McQueen if he knew how to get rid of gunshot residue. McQueen offered some advice, and Haven relayed that information to Jeffries.

The following day, Villanueva came by the apartments and picked up the gun. Haven handed the gun, wrapped in a cloth, to Villanueva. The same day, when Haven texted Fong-Jeffries that she, Jeffries, and the kids were "a little bit safer now," he was referring to the security cameras. When he texted Fong-Jeffries asking whether he could trust her and Jeffries, he was referring to the events of the night before. Having watched Jeffries shoot Ortega, Haven was afraid of him and wanted to be sure that Jeffries did not see him as a liability. Similarly, when he texted that he knew the "loyalty goes both ways," and that, otherwise, he would not have done what he did, he was referring to agreeing to go along with the cover story and getting rid of the murder weapon.

As for his text to Fong-Jeffries about not trusting Curtis, Haven testified that Curtis had already attempted to stab him once. During a drug deal, Curtis pulled a knife on Haven, and Haven pulled out the nine-millimeter. Haven testified that, when he and Fong-Jeffries texted each other to the effect that Wilkey and Curtis "are next," he meant that they needed to be "out of the picture." However, by this, he did not mean that they should be killed. Rather, he only meant that they needed to be "[g]one," and "away from" Haven, Jeffries, and Fong-Jeffries.

Haven acknowledged that he possessed firearms at various times. He had a nine-millimeter handgun which he acquired from Fong-Jeffries. Fong-Jeffries gave Haven the gun because, with Jeffries's domestic violence case ongoing, she did not want it in their apartment. Haven also stored a sawed-off shotgun for a couple of days until Villanueva picked it up. Additionally, he stored the .357-caliber handgun for one night, the night

Ortega was shot. Haven testified that, when he texted Fong-Jeffries about obtaining more ammunition, he was referring to ammunition for the nine-millimeter that she had given to him, not the .357.

Haven testified that, following his arrest, he spoke with law enforcement about this case on three occasions. The day he was arrested, he took the arresting officers to Villanueva's storage unit and told them that the .357 revolver they found in the storage unit was possibly the gun used in Ortega's murder. However, he did not tell them that Jeffries shot Ortega because he was still afraid of Jeffries. Shortly thereafter, Haven spoke with Detective McCue. They discussed the fact that the .357 may be the murder weapon, but Haven denied involvement in the murder or knowing who committed it. A couple of months later, Haven spoke with Detectives McCue and Swisher, and this time told them that he saw Jeffries shoot Ortega.

Haven denied ever telling Fong-Jeffries, Dustin, or anyone else that he shot Ortega. He acknowledged that, in an interview with detectives after his arrest, he told them that Fong-Jeffries knew Jeffries was planning to kill Ortega. However, he further testified that he and Jeffries did not discuss their plan in front of Fong-Jeffries. Rather, according to Haven, his belief that Fong-Jeffries knew about the plan was based on the fact that Jeffries had told him that he discussed the plan with Fong-Jeffries.

After all parties rested, Haven was permitted to reopen his case to present the testimony of Carla Huffman, who was housed in the same pod in the Sacramento County Jail as Fong-Jeffries. Huffman testified that inmates can pass written communications through the plumbing by what inmates refer to as a "fishing line" or a "kite." Huffman testified that, when Fong-Jeffries learned that Huffman and her roommate were "fishing back and forth to the boys upstairs on the 8th floor," she asked Huffman to "pass some mail." Huffman sent kites for Fong-Jeffries three or four times. Huffman testified that she read the kites she sent and received for Fong-Jeffries. When Fong-Jeffries gave Huffman two additional kites to send, Huffman contacted the district attorney's office

and offered to exchange the kites for a better deal on her case. Huffman turned the two kites over to a representative for the district attorney's office.

According to Huffman, when Fong-Jeffries gave her one of the earlier kites to send, she stated that she had to go to court to testify, and that she "needed the questions in the kites answered as soon as possible . . . ." Huffman testified: "In all the kites, she needed to know what to say because it was her turn to testify, and she was scared."

Huffman also testified that Fong-Jeffries once asked her if she could be in trouble for giving someone a gun. When Huffman responded that she could, Fong-Jeffries stated that she had given Jeffries a gun. Although in this conversation, Fong-Jeffries did not specify the type of gun she had given to Jeffries, Huffman had seen a reference in the first kite to a .357. She also referred to the fact that Jeffries had killed someone named Ortega. In one of the kites, there was a question as to whether she was supposed to say that Jeffries picked her up from work on a particular day, even though Fong-Jeffries told Huffman that he had not picked her up from work.

Haven also called Fong-Jeffries. She acknowledged that three exhibits were letters that she had written to Jeffries while incarcerated with the intention of having them delivered to him. She also acknowledged that there had been additional letters. Fong-Jeffries testified that she had solicited others in addition to Huffman to send kites to Jeffries. She acknowledged that, in her kites, she had asked Jeffries how she should answer questions or explain certain facts during her testimony. However, she also testified that she "wasn't looking for [Jeffries] to answer [her] questions." Instead, her letters contained both questions and answers. She was merely "looking for [Jeffries] to read this over to see if that's all [she] needed to go by." She wanted him to point out if she had missed anything. In a letter in which she expressed that she hoped he would answer her questions, she was referring to questions about how the family was doing, not questions about the case. She subsequently testified that she was not trying to "get [her] testimony together with . . . Jeffries through these written communications." She denied

writing anything in a letter about whether Jeffries picked her up from work on a given day. She also denied ever talking with Huffman about her case.

Fong-Jeffries testified, for the first time, that Haven had threatened her. She stated that she had previously indicated that she was worried for her own welfare and that of her family. When asked why she had not specifically testified before that Haven had threatened her, she responded that no one had asked.

Fong-Jeffries testified that she never told anyone in her pod that Jeffries killed Ortega.

Defendant Fong-Jeffries's Rebuttal Case

Fong-Jeffries presented the testimony of Roshann Harris as a rebuttal witness. Harris testified that Fong-Jeffries was her cellmate at the Sacramento County Jail. Harris testified that, in her presence, Fong-Jeffries never talked about her case. She testified that Fong-Jeffries was a very quiet person and did not speak much with anyone.

Harris testified that she had come to know Huffman at the jail. She had observed Huffman attempting to gather information from other inmates about their cases. Harris never saw Fong-Jeffries talk to Huffman.

Verdicts and Sentencing

The jury found Jeffries guilty of murder in the first degree with the special circumstance that he intentionally killed Ortega by means of lying in wait. However, the jury found not true the enhancement alleging personal use of a firearm pursuant to section 12022.53, subdivision (d). The jury further found Jeffries guilty of possession of a firearm by a felon, willful infliction of corporal injury on Amy Quillen, possession of a controlled substance, and falsifying a document. The court sentenced Jeffries to an indeterminate term of life without the possibility of parole on the murder count, a consecutive determinate term of five years on the count of infliction of corporal injury, the principal term of the determinate portion of the sentence (see generally § 1170.1), and

consecutive terms of eight months on each of the remaining counts, resulting in an aggregate sentence of seven years determinate plus life without the possibility of parole.

The jury found Haven guilty of murder in the first degree with the special circumstance that he intentionally killed Ortega by means of lying in wait. However, the jury found not true the enhancement alleging personal use of a firearm pursuant to section 12022.53, subdivision (d). The jury further found Haven guilty of possession of a firearm by a felon (two counts), possession of a controlled substance, and falsifying a document. The court sentenced Haven to an indeterminate term of life without the possibility of parole on the murder count, a consecutive determinate term of two years imprisonment on one count of possession of a firearm by a felon, the principal term of the determinate portion of the sentence, and consecutive terms of eight months on each of the remaining counts, resulting in an aggregate sentence of four years determinate plus life without the possibility of parole.

The jury found Fong-Jeffries guilty of murder in the first degree with the special circumstance that she intentionally killed Ortega by means of lying in wait. The jury further found Fong-Jeffries guilty of falsifying a document. The court sentenced Fong-Jeffries to an indeterminate term of life without the possibility of parole on the murder count and a consecutive determinate term of two years on the falsifying a document count, resulting in an aggregate sentence of two years determinate plus life without the possibility of parole.

DISCUSSION

I. Haven's Suppression Motion

Haven asserts that the trial court erred in denying his motion to suppress the fruits of the warrantless search of the apartment where he was arrested. He claims that the information justifying the search — that a probationer with search conditions allegedly lived in the apartment at the time — was stale. Haven and the People disagree as to whether the applicable standard is whether police had probable cause to believe that

Mary Weick, the probationer, was living at that address at the relevant time, or whether the police's belief in this regard was only required to be supported by a reasonable suspicion. In any event, Haven asserts that Officer Nichols's belief that Weick lived in apartment 2 at the relevant time was not objectively reasonable based on the information available. Haven asserts that, because the People cannot prove beyond a reasonable doubt that the fruits of the illegal, warrantless search did not contribute to his conviction, reversal is required.

We conclude that, even if Nichols or the other law enforcement agents involved violated Haven's Fourth Amendment rights by entering apartment 2 to conduct a probation search, under the circumstances of this case, they cannot be deemed to have engaged in deliberate, reckless, or even grossly negligent conduct, triggering application of the exclusionary rule.

A. Additional Background

Prior to the commencement of trial, Haven moved, pursuant to section 1538.5, to suppress all evidence recovered in connection with the warrantless search of Haven's home and person on April 13, 2012, and the fruits of that search. Haven asserted that there was no lawful basis or justification for the warrantless search. The trial court conducted a suppression hearing.

1. The Prosecution's Evidence

Sacramento Police Officer Matthew Nichols testified that, as of April 13, 2012, he had been to the apartment complex at 2687 Altos Avenue no fewer than a dozen times for calls for service, probation searches, and contacts with subjects nearby. There were four apartments at that address. Nichols testified that the tenancies were "very transitory and there's a lot of in and out, of people going in and out of this apartment complex." According to Nichols, there was "no real steady person that stays in [apartments] 1, 2, 3 or 4, except Mr. Jeffries was there a lot."

Nichols testified that prior to conducting probation searches, officers would enter the subject address into the Known Persons File (KPF), a system maintained by the Sacramento County Sheriff's Department. This system was completely separate from the system maintained by the Sacramento Police Department, and entries made into the Sacramento Police Department's system do not update the KPF. Nichols did not know what steps were taken to update information in the KPF. He testified that it does happen that information obtained from the KPF database is out of date.

On April 13, Nichols and Police Officer Robert Young performed a probation search at 2687 Altos Avenue, apartment 2. Nichols testified that he initiated and organized the search. Based on Nichols's training and experience, 2687 Altos Avenue experienced a high call volume for service, as well as gang activity. Therefore, Nichols searched the 2687 Altos Avenue address, without entering a particular apartment number into the KPF, and learned that Mary Weick, a person on searchable probation, was living in apartment 2 as of 2012. Nichols testified that, in connection with an October 2011 arrest, Nichols looked up Weick's address, and it was 2687 Altos Avenue apartment 2. Nichols testified that he saw this report on a mobile communication system on April 13. However, the KPF database did not reference a report generated from a September 2011 call for service, which Nichols had since reviewed and, which indicated that Weick no longer lived in apartment 2.

According to Nichols, on April 13, seven subjects were inside of apartment 2. Among others, he spoke with Dan Butte, who Nichols knew to be Weick's stepfather, and who told Nichols why Weick was no longer living there, although she had not yet changed her address.

Nichols acknowledged that he had been to the Altos Avenue address in September 2011 as part of a support unit for a previous probation search, but did not enter apartment 2 at that time. Nothing about the September 2011 search would have led Nichols to believe that Weick was not living in apartment 2 as of April 13. Additionally, no other

officers mentioned anything to Nichols on April 13, prior to his organization of the search, which would have led him to believe that Weick was not living in apartment 2.

Officer Young did not do anything to confirm that Weick lived in apartment 2. Young entered the apartment and found Haven inside. Haven was in possession of a gun.

Detective McCue spoke with Weick on April 25, after arresting Jeffries. She reported to McCue that her address was listed as 2687 Altos Avenue, apartment 2. On cross-examination, McCue testified that, on that date, he also spoke with Butte, who told McCue that Weick was no longer living in apartment 2. Butte told McCue that he lived in apartment 2. McCue also testified that he believed that Ricky Chesser told him that Weick lived with him in apartment 3. On redirect, McCue stated that, when he saw Weick on April 25, 2012, she stated that apartment 3 was her boyfriend's apartment, and she would stay there periodically.

2. Haven's Evidence

Haven presented the testimony of Butte, Weick, and Detective Ashley Englefield, and recalled Officer Nichols.[11]

Butte testified that Weick was his stepdaughter. Butte previously lived at 2687 Altos Avenue, apartment 2. He testified that Weick lived with him at that address for some time. At one point, Butte and Weick had a fight, he called the police, and the police came to the apartment and arrested Weick. Butte obtained a restraining order against Weick, and thereafter, she stayed away from Butte's apartment. After this incident, Weick never lived with Butte at the apartment again. According to Butte, at some point in time, Weick began living in apartment 3 with Chesser.

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[11] Haven also presented the testimony of Chesser. However, after Chesser invoked his Fifth Amendment privilege against self-incrimination on cross-examination, the court granted the prosecution's motion to strike his testimony. The court later stated that Chesser's testimony, if not stricken, would not have affected its determination.

Weick testified that her name was on the lease for apartment 2, and Butte moved in with her. She could not recall the particular date when she moved into that apartment, because she moved from one apartment to the next in that complex. Weick testified that the fight with Butte occurred on December 12, 2010. After she got out of jail, she no longer lived in apartment 2. As of the time of the hearing, she lived in apartment 3 with Chesser.

Nichols testified that his prior testimony during the hearing to the effect that an entry appeared in the KPF system for a contact between September 2011, and April 13, 2012, stating that Weick lived in apartment 2 at 2687 Altos Avenue, was incorrect. He had confused a 2010 entry as having occurred in 2011. Nevertheless, on cross-examination by the district attorney, Nichols testified that, based on the information in KPF, he still believed as of April 13, 2012, that Weick lived at 2687 Altos Avenue, apartment 2. Nichols testified that if probationers move without effecting a change of address, police do not have notice of the new address. Nichols testified that, as of April 13, he was unaware of the call for services report from September 2011, which indicated that Weick did not live in apartment 2.

Detective Englefield testified that, on August 22, 2011, she arrested Weick. The address on the booking sheet for the arrest was 2687 Altos Avenue, with no specific apartment number. Englefield testified that she would have obtained the address to enter into the booking sheet from one of three sources, Weick, the law enforcement database accessible through her mobile communication terminal, or the automated records system used by the Sacramento Police Department.

3. The Trial Court's Ruling

In its ruling, the trial court first noted that it was undisputed that Weick was on searchable probation on April 13. Based on the evidence presented at the hearing, the court concluded that Nichols reasonably believed that Weick lived at 2687 Altos Avenue, apartment 2, on April 13, 2012. Nichols's reasonable belief was based on his search of

the KPF database, which set forth that address as where Weick lived. The court also relied on Nichols's testimony that he participated in a probation search in September 2011, at which time, based on representations from other officers, he believed Weick to live in apartment 2. Nothing that occurred during the September 2011 probation search, nor any information derived from any other source, led Nichols to believe that she did not live at that address.

The court observed that, while Weick and Butte testified that Weick moved out of apartment 2 following her arrest in December 2010, the relevant issue was Nichols's state of mind and whether his belief as to Weick's address was reasonable. The court concluded that Nichols was not aware that Weick had moved out of apartment 2, and he reasonably relied on the information in the KPF system, as well as the address Weick herself had continued to provide as her residence. The court noted that Weick never updated her address. The court further noted that Weick had allowed Detective McCue to believe that her address of record was apartment 2 as recently as April 25.

The court expressly stated that it found Nichols and McCue to be credible and reliable. The court found that the probation search was not arbitrary or harassing. The court stated that, even if another officer received information indicating that Weick no longer lived in apartment 2 as of September 2011, Nichols researched Weick's address on the KPF database more recently, and it indicated that Weick lived in apartment 2.

Accordingly, the court denied Haven's motion to suppress.

B. Analysis

" 'It is settled that where probation officers or law enforcement officials are justified in conducting a warrantless search of a probationer's residence, they may search a residence reasonably believed to be the probationer's. [Citations.] [T]he question of whether police officers reasonably believe an address to be a probationer's residence is one of fact, and we are bound by the finding of the trial court, be it express or implied, if substantial evidence supports it.' " (*People v. Downey* (2011) 198 Cal.App.4th 652, 658

(*Downey*), quoting *People v. Palmquist* (1981) 123 Cal.App.3d 1, 11-12, disapproved on another ground by *People v. Williams* (1999) 20 Cal.4th 119, 135.) In determining whether a probation search of a particular apartment was valid in this context, "California case law is clear that the appropriate test is whether the facts known to the officers, taken as a whole, gave them *objectively reasonable grounds to believe* that [the probationer] lived at the apartment." (*Downey*, at p. 661.)

" '[I]n reviewing a determination on a motion to suppress, we defer to the trial court's factual findings which are supported by substantial evidence and independently determine whether the facts of the challenged search and seizure conform to the constitutional standard of reasonableness.' " (*People v. Ferguson* (2003) 109 Cal.App.4th 367, 371.) We are "bound by the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility, including [those that] seemed either untruthful or inaccurate, where . . . the findings are supported by substantial evidence." (*People v. Troyer* (2011) 51 Cal.4th 599, 613.) "If the challenged police conduct is shown to be violative of the Fourth Amendment, the exclusionary rule requires that all evidence obtained as a result of such conduct be suppressed." (*People v. Williams* (1988) 45 Cal.3d 1268, 1299.) However, "[i]f the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." (*United States v. Peltier* (1975) 422 U.S. 531, 542 [45 L.Ed.2d. 374, 384].) "In short, where the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.' " (*United States v. Leon* (1984) 468 U.S. 897, 919-920 [82 L.Ed.2d 677, 696-697], quoting *Stone v. Powell*

(1976) 428 U.S. 465, 539-540 [49 L.Ed.2d 1067, 1114] (dis. opn. of White, J.).) "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." (*Herring v. United States* (2009) 555 U.S. 135, 144 [172 L.Ed.2d 496, 507].)

Here, in its ruling denying Haven's suppression motion, the trial court concluded that Nichols reasonably believed that Weick, who was on searchable probation, lived at 2687 Altos Avenue, apartment 2, on April 13. In reaching this conclusion, the trial court relied on, among other things, Nichols's search of the KPF database on April 13, which set forth that address as where Weick resided. The court also relied on Nichols's testimony that he participated in a probation search of Weick in September 2011, at which time, based on representations from other officers, he believed Weick to live in apartment 2. Nothing that occurred during the September 2011 probation search, nor any information derived from any other source, led Nichols to believe on April 13 that Weick did not live at that address. Indeed, the evidence further showed that Weick continued to represent that she resided in apartment 2 some 12 days after the search, when she told McCue that was her address. The court expressly stated that it found Nichols to be credible and reliable.

We conclude that the evidence regarding the information Nichols gathered from the KPF database leads to the conclusion that neither he nor the other law enforcement officers violated Haven's Fourth Amendment rights deliberately, recklessly, or with gross negligence in entering 2687 Altos Avenue, apartment 2, without a warrant. Nichols testified that it does happen that information derived from the KPF database is discovered to be out of date, in which case, law enforcement would provide the more current information to those who update the KPF system. However, we conclude that,

notwithstanding such occurrences, under the circumstances of this case, it was not grossly negligent, or worse, for Nichols and other law enforcement officers to rely on the information in the KPF database to enter an apartment looking for the named probationer without first attempting to corroborate address information through other sources.

Accordingly, we conclude that, even if Nichols or the other law enforcement agents involved unwittingly violated Haven's Fourth Amendment rights by entering apartment 2 to conduct a probation search for Weick without a warrant, because they were acting based on information in the KPF database which they reasonably believed to be true and accurate, they cannot be deemed to have engaged in deliberate, reckless, or even grossly negligent conduct, triggering application of the exclusionary rule. We conclude that this is the case notwithstanding the fact that it "does happen" that information in the KPF database is out of date and in need of updating. Therefore, we conclude that the trial court properly denied Haven's motion to suppress.

II. Lying-in-Wait Special Circumstance – Sufficiency of the Evidence

Fong-Jeffries asserts that the prosecution presented legally insufficient evidence to prove the lying-in-wait special circumstance as to her. Her contention is based on an erroneous theory of what must be proved to establish an aider and abettor's culpability for a lying-in-wait special circumstance. While, for the sake of this argument, Fong-Jeffries acknowledges that the prosecution could prove that an individual in her position aided and abetted Ortega's murder, she claims that the evidence did not support the conclusion that she intended the actual perpetrators to carry out the murder by lying in wait. We conclude that the People were not required to prove that Fong-Jeffries intended Ortega's murder be committed by means of lying in wait, only that she had the intent to kill and that the actual perpetrators committed the murder by lying in wait. In any event, even if the People were required to prove that Fong-Jeffries intended that the murder be carried out by lying in wait, we conclude that the evidence was legally sufficient to satisfy this requirement.

A. Standard of Review

"The law governing sufficiency-of-the-evidence challenges is well established and applies both to convictions and special circumstance findings. [Citations.] In reviewing a claim for sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or special circumstance beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639 (*Jennings*).) In other words, " '[a] reversal for insufficient evidence "is unwarranted unless it appears 'that upon *no hypothesis whatever* is there sufficient substantial evidence to support' " the jury's verdict.' " (*People v. Penunuri* (2018) 5 Cal.5th 126, 142 (*Penunuri*), italics added.)

B. Lying in Wait

The lying-in-wait special circumstance, which is set forth in section 190.2, subdivision (a)(15), requires that "[t]he defendant intentionally killed the victim by means of lying in wait." The lying-in-wait special circumstance requires " ' " 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) . . . a surprise attack on an unsuspecting victim from a position of advantage . . . .' " ' " (*People v. Johnson* (2016) 62 Cal.4th 600, 629 (*Johnson*).) "[P]hysical

concealment before the attack on the victim is not required. Rather, ' "[i]t is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct." ' " (*Id*. at pp. 631-632.)

C. *People v. Chiu*

In advancing her argument that the evidence was insufficient to support the lying-in-wait special circumstance as to her, Fong-Jeffries relies on the California Supreme Court's decision, *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). In *Chiu*, our high court held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine." (*Id.* at pp. 158-159.) The *Chiu* court determined that such a defendant's liability for that crime "must be based on direct aiding and abetting principles." (*Id.* at p. 159.) The court observed that "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine," and that, "where the direct perpetrator is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing a defendant to be convicted of that greater offense under the natural and probable consequences doctrine." (*Id.* at p. 166.) In reaching this conclusion, our high court stated that the public policy concern served by holding aiders and abettors culpable for the perpetrator's commission of the nontarget offense of second degree murder — deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing — "loses its force in the context of a defendant's liability as an aider and abettor of a first degree premeditated murder." (*Ibid*.) This is so, among other reasons, because the mental state required for first degree murder —the elements of willfulness, premeditation, and deliberation — "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must

act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Ibid.*)

The prosecution here did not advance a natural and probable consequences theory. Fong-Jeffries, however, analogizes the lying in wait element of the special circumstance at issue here with the element of premeditation in *Chiu*, and asserts that the evidence presented at trial was legally insufficient to prove that she intended Ortega's murder to be committed by means of lying in wait. We disagree. The analogy is inapt.

D. Analysis

Section 190.2, subdivision (c), expressly provides: "Every person, not the actual killer, who, *with the intent to kill*, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4." (Italics added.) The lying-in-wait special circumstance reads: "The defendant *intentionally killed* the victim by means of lying in wait." (§ 190.2, subd. (a)(15), italics added.) As the italicized language demonstrates, both the statute governing aider and abettor liability for special circumstances and the lying-in-wait special circumstance explicitly speak to the mens rea requirement: the intent to kill. Unlike other special circumstances that include other mens rea elements in addition to intent to kill, the only mens rea element the aider and abettor to lying in wait murder must share with the actual perpetrator is the intent to kill; thus, a person can be convicted of first degree murder as an aider and abettor and be liable for a special-circumstance finding so long as that person harbored the intent to kill. Fong-Jeffries cites no case that says an aider and abettor must both intend to kill and intend that the murder be carried out by means of lying in wait. To the contrary, in describing the application of the lying-in-wait special circumstance to aiders and abettors, our high court has stated: " 'A lying-in-wait special circumstance can apply to a defendant who, intending that the

victim would be killed, aids and abets an intentional murder committed by means of lying in wait. [Citations.] In this factual setting, *the questions are whether defendant, with the intent to kill, aided and abetted the victim's killing, and whether the actual killer intentionally killed the victim by means of lying in wait.*' " (*Johnson, supra*, 62 Cal.4th at p. 630, italics added, quoting *People v. Bonilla* (2007) 41 Cal.4th 313, 331 (*Bonilla*).)

Moreover, regarding *Chiu*, we note that premeditation at issue in that case, and the lying in wait element of the special circumstance at issue here are addressed to different considerations. Unlike premeditation, lying in wait is not really a mental state at all. The lying in wait element is the means by which the murder is committed. (*People v. Hyde* (1985) 166 Cal.App.3d 463, 475.) It, in effect, is the actus reus of the special circumstance. It requires concealment of purpose, a substantial period of watching and waiting, and a surprise attack. (*Johnson, supra*, 62 Cal.4th at pp. 631-632.) Accordingly, other than requiring an illegal purpose, the lying in wait element consists of conduct. The theory "assumes that if the means of the murder are by lying in wait, those means adequately establish the murder as the equivalent of a premeditated murder without any additional evidence of the defendant's mental state." (*Hyde*, at p. 475.) The *Chiu* court's concern with the actual killer's "uniquely subjective and personal" mental state required for premeditated murder — a deliberate act after carefully weighing the considerations for and against a choice to kill — is not at issue with regard to the special circumstance of lying in wait.

Additionally, whereas an aider and abettor may be convicted of murder in the second degree as the natural and probable consequence of committing a target crime, for example, of an assault or disturbing the peace, a direct aider and abettor such as Fong-Jeffries in the circumstances at issue here personally harbors the intent to aid and abet in the killing; in other words, such a defendant shares with the actual perpetrators the same mens rea — intent to kill. This renders far less compelling any argument for reduced culpability based on ignorance of an accomplice's methods. Moreover, we are not

persuaded by the argument that an aider and abettor may avoid enhanced punishment by maintaining ignorance of the means by which the actual killer elects to carry out the murder intended by all involved. As we have noted, the aider and abettor need not have the intent to carry out the killing by lying in wait to be culpable for the lying-in-wait special circumstance; the prosecution need only prove the aider and abettor shared the intent to kill and that the actual killer intentionally killed the victim by means of lying in wait. (*Johnson*, *supra*, 62 Cal.4th at p. 630; *Bonilla*, *supra*, 41 Cal.4th at p. 331.)

In this regard, the lying-in-wait special circumstance is similar to the financial gain special circumstance applied to a person who hires a hitman. In *People v. Battle* (2011) 198 Cal.App.4th 50 (*Battle*), another panel of this court addressed an instructional error claim related to the financial gain special circumstance. The defendant complained that the trial court's instruction improperly told the jury that the hirer of a murderer is subject to the financial gain special circumstance even if his motive is not financial gain. Section 190.2, subdivision (a)(1), sets forth the financial gain special circumstance: "The murder was intentional and carried out for financial gain." Consistent with the elements of the financial gain special circumstance, the jury was instructed with the CALCRIM pattern instruction: "the elements . . . are (1) the defendant's intent to kill, (2) a killing carried out for financial gain, and (3) an expectation that financial gain would result from the killing." (*Battle*, at p. 83.) The trial court added a special instruction: " 'If a person commits murder for hire, the one who did the hiring is subject to the financial gain special circumstance even if his motives are not for financial gain. You must still determine whether the defendant hired someone with the specific intent to kill [the victim].' " (*Id.* at p. 84.) Rejecting the defendant's argument that the instruction eliminated the elements purportedly required for aiding and abetting the killer's financial motive, this court held, "[i]t is enough that (1) the nonkiller hired another to kill, (2) the hirer intended to kill, and (3) the actual killer was motivated by financial gain." (*Ibid*.) So too with lying in wait, it is enough that (1) the aider and abettor intended to kill, (2)

the actual killer intended to kill and (3) the actual killer killed the victim by means of lying in wait. (*Johnson, supra*, 62 Cal.4th at p. 630; *Bonilla, supra*, 41 Cal.4th at p. 331.)

Fong-Jefferies relies on *People v. Pearson* (2012) 53 Cal.4th 306 (*Pearson*) and our high court's holding that aiding and abetting instructions in that case were correct because they did not allow an aider and abettor to be held culpable for torture special circumstance unless the aider and abettor knew of and shared the actual perpetrator's specific intent to inflict extreme pain and suffering. In *Pearson*, the defendant argued the instructions allowed the jury to reach guilty verdicts on first degree murder by torture and a true finding on a torture-murder special circumstance finding without finding the defendant had the requisite mental state for torture. (*Id*. at p. 320.) Torture murder and torture-murder special circumstance require that the person inflicting the injury do so with the " 'specific intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose,' " and the jury was so instructed. (*Ibid*, fn. omitted.) Acknowledging that the instruction on first degree torture murder and torture special circumstances did not require a finding that an aider and abettor personally harbors specific intent to cause extreme pain to the victim, the court reasoned that the general aiding and abetting instruction covered that requirement, thus ensuring that the jury found the defendant shared the actual perpetrator's specific intent to inflict extreme pain and suffering on the victim. (*Id*. at pp. 320-321.)

Pearson does not help Fong-Jefferies. Torture-murder special circumstances and lying-in-wait special circumstances are different. In addition to intent to kill, the torture-murder special circumstance includes additional mens rea elements related to torture — specific intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose. It is these elements which the aider and abettor of torture-murder special circumstances must share with the actual perpetrator. The only mens rea requirement for lying-in-wait special circumstance is the intent to kill.

Accordingly, we reject Fong-Jeffries's contention that the prosecution was required to prove that she harbored the intent that Ortega's killing be carried out by means of lying in wait. In any event, we further conclude that the evidence here was legally sufficient to establish that Fong-Jeffries personally intended that Ortega's murder be carried out by means of lying in wait; that is, she intended that the murder be carried out by the actual perpetrators by concealing their purpose, after watching and waiting for an opportune time to act, and then launching a surprise attack on the unsuspecting Ortega from a position of advantage. (See generally, *Johnson*, *supra*, 62 Cal.4th at p. 630.)

Haven testified that Jeffries had told Fong-Jeffries about their plan to kill Ortega.[12] And the other evidence establishes that Fong-Jefferies shared the intent to kill with Haven and Jefferies and aided and abetted the duo by encouraging their activities and supplying the ammunition and vehicle to carry out the plan.

As for the nature of that plan, and Haven's and Jeffries's prior attempts to carry it out, the evidence established that they repeatedly attempted to coax Ortega out with them under the artifice that they would engage in criminal enterprises together, such as stealing cars, in order to lure him to a secluded location where they could shoot him. Jeffries and Haven obviously concealed their true purpose from Ortega. They also persevered through a substantial period of waiting for an opportune time to act. Finally, on March 28, 2012, after succeeding in luring Ortega to a secluded location under the guise of a trip to steal cars, either Haven or Jeffries or both shot Ortega in the back, clearly a surprise attack on an unsuspecting victim from a position of advantage. (See generally, *Johnson*, *supra*, 62 Cal.4th at p. 630.)

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[12] In admitting this testimony, the trial court expressly did not limit its admissibility to Jeffries, concluding that Jeffries's statement was a declaration against interest. (See *People v. Cervantes* (2004) 118 Cal.App.4th 162, 177.) Such statements are nontestimonial and their admission does not violate a defendant's confrontation clause rights. (*People v. Arceo* (2011) 195 Cal.App.4th 556, 575.)

Fong-Jeffries engaged in numerous text message conversations with Haven in the days leading up to Ortega's murder from which it can be inferred that she was aware of the plan to kill Ortega. On March 23, shortly after Haven texted Jeffries that he was with Ortega and Dustin in the truck, and he believed that Ortega had what might be a gun, Fong-Jeffries texted Haven, "Please be safe, okay?" In a message on the afternoon of March 26, Haven asked Fong-Jeffries if she could get him "a box of what [they] talked [a]bout the other night." When Fong-Jeffries asked whether everything was okay, Haven responded, "[i]t's just with everything goin[g] on [I'd] feel more co[m]fortable havin[g] more [than] 6 feel me." Haven then stated that he "will eliminate these [obstacles] in our way. I[']m done playin[g] with him [and] [T]ony." Fong-Jeffries then stated, "[you] know once [T]ony done [T]eresa is gonna have to be done quick." Fong-Jeffries subsequently reassured Haven she would "get a box for [him]." The box of ammunition, minus some of its contents, and the murder weapon were later found in Villanueva's storage unit.

On the afternoon of March 27, 2012, the day of the murder, Haven texted Fong-Jeffries that he needed to use her car that night. Fong-Jeffries asked what Jeffries said about that. She then stated, "I need to know what [Jeffries] says cuz I'm not gonna do anything to piss him off . . . ." After responding that Jeffries had been agreeable the previous night, Haven texted Fong-Jeffries, "But regardless our [T]ony problems end tonigh[t]." Fong-Jeffries stated that she wanted to make sure that Jeffries was still agreeable, but then stated, "If [you] take my car . . . please be careful." Later, Haven texted to Fong-Jeffries that "[when] it comes to [T]ony his lu[c]k ends t[o]night. [You] hav[e] my word on that." Fong-Jeffries responded, "This definitely needs to come to an end. I also want [you] to be careful . . . I'm [seriously] mad[] enough to do [something] that could get me in trouble. . . ." Haven then responded, "I got this but [you] guys hav[e] to let me do it my way. This tryin[g] to b[e] his friend & help him shit ain[']t workin[g]." He then stated, "Hey we'll talk more [a]bout it [when] [you] get here ok.

But [either] way it ends tonight." Fong-Jeffries replied, "[T]rust me I'm already knowin[g] . . . . I think that's all over now [though]. I think things have taken a sudden turn. . . ." Apparently realizing their text conversation implicated her in the plan, Fong-Jeffries then texted, "erase these messages please."

On March 28, 2012, the morning after Ortega was killed, Fong-Jeffries texted Haven and asked, "*Did everything go as planned[?]* I haven't been able to talk to [Jeffries] about anything yet . . . ." (Italics added.) Haven responded, "[you], [Jeffries] & the kids [are] a [little] bit safer now. The security system has been tightened up. I told [you] [I]'d fix it feel me."

These text messages demonstrate Fong-Jeffries shared the intent to kill Ortega, knew of the plan to kill Ortega, that the ongoing plan was concealed from Ortega, and that Jeffries and Haven had been attempting to carry out the plan, but were forced to continue to wait for an opportune time and favorable circumstances.

Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found, beyond a reasonable doubt, that Fong-Jeffries intended that Ortega's murder be carried out by means of lying in wait. (See generally *Jennings, supra,* 50 Cal.4th at p. 638.) Certainly, given the evidence, we cannot say that " ' " 'upon *no hypothesis whatever* is there sufficient substantial evidence to support' " ' " such a finding. (*Penunuri, supra,* 5 Cal.5th at p. 142.) Accordingly, we conclude that Fong-Jeffries's claim that the evidence was legally insufficient to prove the lying-in-wait special circumstance as alleged against her is without merit.

III. Instructional Error – Lying in Wait

Fong-Jeffries asserts that the instructions given by the court allowed her to be convicted of the lying-in-wait special circumstance without proof that she knew or intended the murder to be committed by lying in wait. Consistent with the discussion in part II, *ante*, we conclude that the trial court was not required to instruct the jurors that the People had to prove that Fong-Jeffries intended the murder to be committed by means

of lying in wait. We further conclude that, even if the court was required to so instruct the jury, the charge, as a whole, was proper.[13]

A. Additional Background

The court instructed the jury with CALCRIM No. 401, "Aiding and Abetting: Intended Crimes." The instruction provided, in pertinent part, that the prosecution was required to prove that the defendant knew that the perpetrator intended to commit the crime, and that, before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime. (CALCRIM No. 401.)

The court also instructed the jury with CALCRIM No. 416, "Evidence of Uncharged Conspiracy," in relation to the murder count. That instruction provided, in part, that "[a] member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy."

The court instructed the jury with CALCRIM No. 702, "Special Circumstances: Intent Requirement for Accomplice." That instruction provided, in pertinent part, that, to prove the special circumstance of murder by lying in wait as to a defendant who was not the actual killer but who was guilty of murder in the first degree as an aider and abettor, the People were required to prove that "the defendant acted with the intent to kill."

The court also instructed the jury with CALCRIM No. 728, "Special Circumstances: Lying in Wait." That instruction set forth the requirements to prove the special circumstance, and specifically provided that the People were required to prove, inter alia, that the "defendant intentionally killed . . . Ortega," and that the defendant "committed the murder by means of lying in wait."

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[13] Jeffries joins Fong-Jeffries in this argument. We reject his contentions for the same reasons as set forth herein with regard to Fong-Jeffries.

After the jury began deliberating, the jurors submitted a note to the court, asking: "Can someone be guilty of aiding [and] abetting to a special circumstance of lying in wait?" After consulting counsel, the court responded, "yes." The court directed the jurors to review CALCRIM Nos. 400 ("Aiding and Abetting: General Principles"), 401, and 702. The court further instructed the jury: "In order to convict a defendant of the special circumstance of murder by lying in wait, under the theory of aiding and abetting, the aider and abettor must share the requisite specific intent with the perpetrator, as defined in the instructions for lying in wait. [¶] An aider and abettor shares the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and aids, facilitates, promotes, encourages, or instigates the crime with the intent or purpose of facilitating the perpetrator's commission of the crime."

B. Forfeiture

As the People observe, Fong-Jeffries did not object to the special circumstances instructions. " 'Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights.' " (*Battle, supra*, 198 Cal.App.4th at p. 64, quoting *People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) " 'Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087 (*Ramos*).) Thus, we consider the merits.

C. Standard of Review

We review claims of instructional error de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) We must review jury instructions based on how a reasonable juror would construe them. (*People v. Clair* (1992) 2 Cal.4th 629, 688.) "When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable

likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229 (*Houston*).)

D. Analysis

The flaw in Fong-Jeffries's argument is her reliance on the premise that, to be punished pursuant to the lying-in-wait special circumstance, as an aider and abettor as opposed to the actual killer, the People were required to prove that she bore the specific intent that the murder be carried out by means of lying in wait. We have fully considered that claim, *ante*, and we have found it to be without merit.

In any event, we conclude that, even if the People were required to prove that Fong-Jeffries specifically intended that Ortega's murder be carried out by means of lying in wait, the trial court properly instructed the jurors in this regard. The court correctly instructed the jurors that, for Fong-Jeffries to be convicted as an aider and abettor, the People were required to prove that she knew that her codefendants intended to commit murder, and that, before or during the commission of the crime, she intended to aid and abet them in committing the crime. (CALCRIM No. 401.) The court further correctly instructed the jury that, to prove the special circumstance of murder by lying in wait as to a defendant who was not the actual killer but who was guilty of murder in the first degree as an aider and abettor, the People were required to prove that "the defendant acted with the intent to kill." (CALCRIM No. 702.) The court also correctly instructed the jury with CALCRIM No. 728 that the People were required to prove, inter alia, that the "defendant intentionally killed . . . Ortega," and that the defendant "committed the murder by means of lying in wait." (CALCRIM No. 728.)

Viewing the instructions as a whole in the context of the trial record (see *Houston*, *supra*, 54 Cal.4th at p. 1229), we conclude that, even if the People were required to prove that Fong-Jeffries intended that Ortega's murder be carried out by means of lying in wait, the trial court properly instructed the jurors on this point at the outset. We disagree with Fong-Jeffries's claim that the foregoing instructions were "conflicting." Moreover, any

shortcoming in these instructions was cured by the court's response to the jury question as to whether a defendant may be guilty of aiding and abetting a special circumstance of lying in wait. To this question, the court responded in the affirmative, and further instructed the jury: "In order to convict a defendant of the special circumstance of murder by lying in wait, under the theory of aiding and abetting, the aider and abettor must *share the requisite specific intent with the perpetrator*, as defined in the instructions for lying in wait. [¶] An aider and abettor *shares the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose* and aids, facilitates, promotes, encourages, or instigates the crime with the intent or purpose of facilitating the perpetrator's commission of the crime." (Italics added.)

IV. Uncharged Conspiracy Instruction

Fong-Jeffries claims, and both codefendants join her in claiming, that uncharged conspiracy is not a valid theory of accomplice liability. They claim that the trial court erred in instructing the jury that they could be found guilty on a conspiracy theory of accomplice liability. The California Supreme Court has rejected this argument, and, accordingly, we conclude that this contention is without merit.

We note that, due to the defendants' failure to object to the instruction in the trial court, they have forfeited their contention unless the alleged error violates a substantial right. (*Battle*, *supra*, 198 Cal.App.4th at p. 64.) Nevertheless, because they claim, in effect, that the alleged error violated their substantial rights, we consider the issue. (*Ramos*, *supra*, 163 Cal.App.4th at p. 1087.)

Without delving into the intricacies of the defendants' contentions, we simply observe that our high court has rejected the identical claim. In *People v. Hajek and Vo* (2014) 58 Cal.4th 1144 (*Hajek and Vo*), disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, the defendants challenged the use of uncharged conspiracy as a theory of derivative liability where the defendants were not charged with the substantive offense of conspiracy. (*Hajek and Vo*, at p. 1200.) Our high court

rejected the substance of the defendants' claim as meritless. (*Ibid*.) The court noted that conspiracy principles are often, and for a variety of reasons, properly used in cases where the substantive crime of conspiracy is not charged. (*Ibid*.) The court further stated: "Conspiracy can itself be the basis of derivative liability quite apart from aiding and abetting principles. 'It is long and firmly established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator. [Citations.] "Failure to charge conspiracy as a separate offense does not preclude the People from proving that those substantive offenses which are charged were committed in furtherance of a criminal conspiracy [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory [citations]." [Citation.]' [Citation.] Contrary to Hajek's assertion, use of an uncharged conspiracy does not violate state law, even though the statutory definition of 'principals' set forth in section 31 does not include conspirators." (*Id.* at pp. 1200-1201.)

Thus, based on *Hajek and Vo*, we reject defendants' claim that the trial court erred in instructing the jury on an uncharged conspiracy theory of accomplice liability. We also reject, as we must (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), their invitation to abrogate the case law holding that the use of uncharged conspiracy as a theory of accomplice liability is proper.

Additionally, because defendants' contentions in this regard are without merit, their claim that this alleged error violated their federal constitutional rights is likewise without merit.

V. Corroboration of Accomplice Testimony

Fong-Jeffries asserts that her conviction for murder must be reversed because the People presented insufficient corroboration of accomplice testimony. She asserts that the evidence suggesting that she purchased ammunition at Haven's request and allowed Haven to use her car was insufficient to corroborate Haven's incriminating accomplice testimony. She argues that the prosecution presented no evidence to establish that she

intended the ammunition to be used to kill Ortega or that the car be used in the process. We disagree.

"An accomplice is . . . one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall *tend to connect* the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (*Ibid.*, italics added.)

Such corroborating evidence "may not come from, or require ' "aid or assistance" ' from, the testimony of other accomplices or the accomplice himself. [Citations.] The evidence, however, need not corroborate every fact to which the accomplice testifies. [Citations.] ' "Corroborating evidence *may be slight,* may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." ' " (*People v. Whalen* (2013) 56 Cal.4th 1, 55 (*Whalen*), disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 44, fn. 17, italics added.)

Contrary to Fong-Jeffries's contention, we conclude that the People presented sufficient evidence *tending to connect* her with Ortega's murder so as to corroborate Haven's incriminating accomplice testimony. Indeed, her numerous text message conversations with Haven leading up to Ortega's murder do not merely *tend* to connect her to the murder, they *conclusively* connect her. Viewing the evidence in the light most favorable to the prosecution (see generally *Jennings, supra,* 50 Cal.4th at p. 638), we conclude that the foregoing was sufficient evidence tending to connect Fong-Jeffries with Ortega's murder. (*Whalen, supra,* 56 Cal.4th at p. 55.)

VI. Accomplice Instructions

Fong-Jeffries asserts that the trial court violated her right to testify and present a complete defense by giving jury instructions directing the jurors to view accomplice testimony with caution. She asserts that, because she testified in her own defense (and in Haven's case regarding her conduct while in jail), and was not called by the People, the court's instructions improperly shifted the burden of proof because the instructions provided that evidence presented in her defense had to be corroborated and should be viewed with caution. Haven asserts the instructions had a similar effect with regard to much of his testimony because he was an accomplice and much of his testimony with regard to Fong-Jeffries's involvement was exculpatory. We conclude that the court's instructions were proper.

A. Additional Background

The trial court instructed the jury with CALCRIM No. 301, "Single Witness's Testimony." Specifically, the court instructed: "Except for the testimony of Wendy Fong-Jeffries, Robert Haven, Granvil Smith, and Dustin Cook, which requires supporting evidence if you decide he or she is an accomplice, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

The trial court also instructed the jury with CALCRIM No. 334. That instruction provided: "Before you may consider the statement or testimony of Dustin Cook, Wendy Fong-Jeffries, Robert Haven, Andrew Jeffries, or Granvil Smith as evidence against the defendants, you must decide whether these witnesses were an accomplice to any of the charged crimes. [¶] . . . [¶] If you decide that a declarant or witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her statement or testimony as you would that of any other witness. [¶] If you decide that a declarant or witness was an accomplice, then *you may not convict* the defendant of any of the charged crimes or allegations based on his or her statement or testimony alone. *You*

may use the statement or testimony of an accomplice to convict the defendant only if: [¶] One, the accomplice's statement or testimony is supported by other evidence that you believe; [¶] Two, that supporting evidence is independent of the accomplice's statements or testimony; [¶] And three, that supporting evidence tends to connect the defendant to the commission of the crimes. [¶] Supporting evidence, however, may be slight. It does not need to be enough by itself, to prove that the defendant is guilty of the charged crimes, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice. [¶] Any statement or testimony of an accomplice *that tends to incriminate the defendant* should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence." (Italics added.)

B. Forfeiture

Fong-Jeffries did not object to the provision of CALCRIM No. 301 or 334. In the absence of any objection to the instruction, she has forfeited this claim (*People v. Valdez* (2004) 32 Cal.4th 73, 113) unless we were to determine that her claim amounts to one of instructional error affecting her substantial rights (§ 1259). In any event, we reach the merits of Fong-Jeffries's claim since, among other things, she claims that trial counsel was constitutionally ineffective for failing to raise this objection.

C. Analysis

As the People observe, the California Supreme Court has expressly held that the former accomplice instruction from CALJIC, similar to the CALCRIM instruction set

forth above, "is applicable regardless which party called the accomplice." (*People v. Guiuan* (1998) 18 Cal.4th 558, 569 (*Guiuan*).) Our high court subsequently clarified that, in the case of codefendants testifying in a joint trial, "there appears to be no persuasive reason not to require such an instruction when requested by a defendant in a case where the codefendant testifies." (*People v. Box* (2000) 23 Cal.4th 1153, 1209, disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 217-218 (*Alvarez*).) Moreover, there is precedent supporting the proposition that a trial court may be required to issue these instructions even in the absence of a request from one of the codefendants. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 (*Coffman and Marlow*).)

In *Coffman and Marlow*, two defendants charged with the same offenses each testified, and each defendant's testimony tended to incriminate the other. (*Coffman and Marlow, supra,* 34 Cal.4th at pp. 104-105.) The trial court, not based on a request by either of the codefendants, gave accomplice instructions similar to those at issue here, in a modified version of CALJIC No. 3.18. (*Coffman and Marlow*, at pp. 103-104 & fn. 34.) On appeal, the defendants argued that, because, under the circumstances, the instructions required the jury to view the testimony of one defendant tending to incriminate the other with distrust, while not requiring the jury to view with distrust testimony not tending to incriminate the other defendant, the instructions were essentially impossible to follow. (*Id.* at pp. 103-104.) They further claimed that these instructions undermined the presumption of innocence and deprived them of due process. (*Id*. at pp. 103-105.) The California Supreme Court rejected the defendants' contentions, stating, "Because the evidence abundantly supported an inference that each defendant acted as an accomplice to the other, and because each testified and, to some extent, sought to blame the other for the offenses, *the court was required to instruct the jury* that an accomplice-defendant's testimony should be viewed with distrust *to the extent it tended to incriminate the codefendant*." (*Id*. at pp. 104-105, italics added, fn. omitted.) In support

of its conclusion, our high court relied on both *Guiuan* and *Alvarez* (*Coffman and Marlow*, at pp. 104-105 & fn. 36), in the latter of which our high court held that the trial court has the authority to give such instruction when two codefendants testify on their own behalf, deny guilt, and incriminate each other (*Alvarez, supra,*14 Cal.4th at pp. 217-218). In rejecting Fong-Jeffries's claims that the instructions improperly singled out her testimony, undermined her credibility, undermined the presumption of innocence, and deprived her of due process, we repeat our high court's observation: " 'The testimony of a defendant ought not to be viewed *without distrust* simply because it is given by a defendant. Under the law, a defendant is surely equal to all other witnesses. But, under that same law, he [or she] is superior to none.' " (*Coffman and Marlow*, at p. 105, fn. omitted.)

For the reasons discussed in *Coffman and Marlow*, we reject Fong-Jeffries's claim that, while the instructions may properly state the law, they were "confusing and contradictory." Furthermore, when viewed as a whole (see *Houston, supra,* 54 Cal.4th at p. 1229), the instructions clearly directed the jurors that only statements or testimony of an accomplice "*that tend*[] *to incriminate the defendant* should be viewed with caution." (Italics added.) The instructions given here further provided that corroboration is required only when the statement of the accomplice is used to convict the defendant.

We also disagree with Fong-Jeffries's claim that the instructions given were partisan and argumentative. " 'An instruction is argumentative when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. [Citation.]' [Citation.] An argumentative instruction is ' "an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' " ' " (*Battle, supra,* 198 Cal.App.4th at p. 85.) Here, the instructions were neither argumentative nor partisan. CALCRIM Nos. 301 and 334 neutrally set forth the accomplice corroboration rule in a manner that did not favor either party, did not recite facts drawn from the evidence in a manner as to

constitute argument, and did not invite the jury to draw inferences favorable to one of the parties based on specified evidence.

Fong-Jeffries claims that, under *Washington v. Texas* (1967) 388 U.S. 14 [18 L.Ed.2d 1019], the instructions at issue here violated her Sixth Amendment right to compulsory process. However, the state statute invalidated in that case provided that persons charged as principals, accomplices, or accessories in the same crime could not be introduced as witnesses for each other. (*Id.* at pp. 14-15.) Such a procedure is clearly distinguishable from the instructions at issue here. CALCRIM Nos. 301 and 334 did not violate Fong-Jeffries's right to compulsory process.

Accordingly, we conclude that it was not error for the trial court to give these instructions. Moreover, because we conclude that Fong-Jeffries's contentions are without merit, any failure by her trial attorney to object to these jury instructions did not constitute ineffective assistance of trial counsel. (See *People v. Bradley* (2012) 208 Cal.App.4th 64, 90 ["Failure to raise a meritless objection is not ineffective assistance of counsel."].)

VII. Cumulative Error

Fong-Jeffries contends that the cumulative effect of the errors she claims occurred at trial warrants reversal. We reject this contention. The premise behind the cumulative error doctrine is that, while a number of errors may be harmless taken individually, their cumulative effect requires reversal. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1236-1237.) We have rejected as meritless Fong-Jeffries's various claims of error. Accordingly, we find no merit to her claim of cumulative error.

VIII. *Chiu* and the Purported Creation of a New Lesser Included Offense

Jeffries asserts that the California Supreme Court in *Chiu, supra*, 59 Cal.4th 155, created a new, lesser included offense of second degree murder based on aiding and abetting a lesser crime where murder results as a natural and probable consequence. He claims this new, lesser included offense arguably applied to him because substantial

evidence supported the premise that he only intended Haven to "administer a beating to, or otherwise assault" Ortega. Jeffries claims that, because the trial court had the duty to instruct, sua sponte, on lesser included offenses, he can raise this claim despite the fact that he did not seek such an instruction before the trial court. He asserts that he could have been found guilty of second degree murder, as a lesser included offense of first degree murder, under any theory of derivative liability, including aiding and abetting and under the natural and probable consequences doctrine. We disagree.

"It is well established that even in the absence of a request, the trial court has a sua sponte duty to instruct on lesser included offenses when there is substantial evidence the defendant is guilty only of the lesser offense. [Citation.] This requirement is based upon the rule that 'the court must instruct sua sponte on "the 'general principles of law governing the case;' " i.e., those " 'closely and openly connected with the facts of the case before the court.' " [Citations.]' [Citations.] [Other] cases have found the requirement is based upon the defendant's ' "constitutional right to have the jury determine every material issue presented by the evidence." ' " (*People v. Cook* (2001) 91 Cal.App.4th 910, 917.)

Jeffries contends that the trial court had a duty to instruct the jury, sua sponte, on the "new, potential lesser included offense of second degree murder based on aiding and abetting a lesser crime where murder resulted as a natural and probable consequence." However, the sua sponte duty to instruct on the natural and probable consequences doctrine that is imposed where necessary to the jury's understanding of the charge and because the instructions are closely and openly connected with the facts of the case "is quite limited. It arises only when the prosecution has elected to *rely* on the 'natural and probable consequences' theory of accomplice liability and the trial court has determined that the evidence will support instructions on that theory." (*People v. Prettyman* (1996) 14 Cal.4th 248, 269 (*Prettyman*).) The prosecutor here did not rely on the natural and probable consequences doctrine, and did not request that the jury be instructed with

regard thereto. Thus, "it was not one of the 'general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case.' " (*Id.* at p. 270.) We are not persuaded by Jeffries's argument that, notwithstanding our high court's pronouncement in *Prettyman*, following *Chiu*, trial courts have a duty to instruct the jury on the natural and probable consequences doctrine, despite the fact that the prosecution does not rely on it, based on the court's general obligation to instruct on all lesser included offenses supported by substantial evidence. We thus, reject Jeffries's claim that, in *Chiu*, the California Supreme Court, in effect, created a new theory of liability about which the court here had a duty to sua sponte instruct the jury.

IX. Prior Domestic Violence Evidence – Evidence Code section 1109

Jeffries asserts that the trial court erred in denying his in limine motion to exclude evidence of prior domestic violence. Jeffries claims that, pursuant to the provisions of Evidence Code sections 1109 and 352, the court erred in admitting this evidence given its negligible probative value and the extremely prejudicial effect it would have on the jury. Jeffries claims that the relevant limiting instruction failed to mitigate the unfair prejudice resulting from the introduction of this evidence. Jeffries also claims that the improper admission of this evidence deprived him of a fair trial.

We conclude that the trial court did not abuse its discretion in denying Jeffries's in limine motion. The probative value of this evidence was not substantially outweighed by the danger of undue prejudice. We further conclude that the introduction of this evidence did not deprive Jeffries of a fair trial.

A. Additional Background

As the court addressed the parties' motions in limine, the prosecutor objected to Jeffries's in limine motion to exclude evidence that he had sustained any criminal conviction, including crimes of moral turpitude. The prosecutor noted that Jeffries had two prior convictions for violations of section 273.5, one in 2008, a felony, and another

in 2004, a misdemeanor. The court noted that one of the prior victims was Quillen, and the other conviction involved a different person. With regard to the facts underlying the incident resulting in the 2008 conviction, the prosecutor stated that Jeffries became angry with Quillen, punched her legs, and head-butted her, and, on another occasion, he brandished a gun and threatened to kill her. The court noted that, in the charged offense, the People alleged that Jeffries punched Quillen in the face, split her lip, prevented her from leaving, and threatened to kill her. The prosecutor asserted Evidence Code section 1109 applied, and further noted that Jeffries was charged with similar crimes in the instant case.

Defense counsel argued that such evidence should be barred as unduly prejudicial pursuant to Evidence Code section 352, because the prior convictions were too similar to the charged offenses, and, therefore, the jury would assume guilt since Jeffries had been found guilty of the same crimes previously. Defense counsel claimed that, particularly in light of the fact that this was a murder case, the evidence the prosecutor sought to introduce would be prejudicial as to all of the charges. Essentially, defense counsel argued that the jury would hear the evidence of the prior convictions and conclude that "that's the type of person he is." Thus, according to defense counsel, this evidence was unduly prejudicial.

The court stated that it considered the facts of the prior case and the instant case, corroboration, and remoteness. The court noted that the victim in the 2008 conviction and in this case were the same, and therefore the presentation of evidence as to the prior incident would not be unduly time-consuming. The court also stated that the earlier incident occurred within five years of this case, and was thus, not remote. The court also observed that the prior incident resulted in a conviction. The court concluded that the facts underlying the prior incident were not more inflammatory than those at issue in this case. The court also determined that it was unlikely that the jury would misuse the

evidence concerning the prior case in considering the charges in this case. In addition, the court stated that any confusion would be allayed by CALCRIM No. 852.[14]

The court expressly ruled that the probative value of the evidence was not substantially outweighed by the probability that the admission of the evidence would necessitate undue consumption of time or create a substantial danger of undue prejudice, confusing the issues, or misleading the jury. Accordingly, the court denied Jeffries's motion, ruling that this evidence was admissible.

B. Relevant Legal Principles and Standard of Review

"Except as provided in subdivision (e) or (f),[15] in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101[16] if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).)

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) We review a trial court's rulings on the admissibility of evidence for abuse of discretion. (*People v. Benavides* (2005) 35 Cal.4th 69, 90.) "The prejudice which

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[14] This is now CALCRIM No. 852A.

[15] Subdivisions (e) and (f) address circumstances not relevant here.

[16] Evidence Code section 1101, subdivision (a), provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues.*' " (*People v. Karis* (1988) 46 Cal.3d 612, 638, italics added; *People v. Holford* (2012) 203 Cal.App.4th 155, 167.) "Evidence is not inadmissible under section 352 unless the probative value is 'substantially' outweighed by the probability of a 'substantial danger' of undue prejudice or other statutory counterweights." (*Holford*, at p. 167.)

" 'The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. Other factors affecting the probative value include the extent to which the source of the evidence is independent of the charged offense, and the amount of time between the uncharged acts and the charged offense. The factors affecting the prejudicial effect of uncharged acts include whether the uncharged acts resulted in criminal convictions and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses.' " (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.)

C. Analysis

The uncharged offense at issue here was the 2008 felony conviction pursuant to section 273.5. In the underlying incident, which occurred in 2007, Jeffries became angry with Quillen, punched her legs, and head-butted her, and, on another occasion, he brandished a gun and threatened to kill her. In the charged offense, the People alleged that Jeffries punched Quillen in the face, split her lip, prevented her from leaving, and threatened to kill her. These incidents are substantially similar. Additionally, the 2008

conviction was not remote in reference to the 2012 domestic violence offense charged in the instant case.

As to the factors addressed to prejudice, the 2007 incidents resulted in a conviction in 2008. Accordingly, there is no risk that the jury here would be motivated to punish Jeffries for the uncharged offense. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 806.) Additionally, in this case involving charges including first degree murder, as well as Jeffries's violence against Quillen, the uncharged acts evidence was neither stronger nor more inflammatory than the evidence relating to the charged offenses.

Jeffries claims that the introduction of evidence pertaining to the 2007 incidents was unduly prejudicial because, during those incidents, he allegedly brandished a handgun, thus demonstrating his "predisposition to kill with a gun." However, the fact that the evidence indicated that Jeffries used a handgun in the 2007 incident involving Quillen did not tip the balance in favor of a finding that the probative value of this evidence was substantially outweighed by the risk of undue prejudice. Additionally, as the People observe, the court instructed the jury, pursuant to CALCRIM No. 852, that this evidence was introduced for the limited purpose of deciding whether Jeffries had committed the charged domestic violence offense against Quillen, and it was not to be considered for any other purpose.

Accordingly, we conclude that the trial court did not abuse its discretion in denying Jeffries's in limine motion to preclude this evidence. Moreover, because we conclude that the introduction of this evidence was proper, we reject Jeffries's claim that its introduction violated his right to a fair trial.

X. Uncharged Offenses as Propensity Evidence

Jeffries asserts that the introduction of other crimes evidence pursuant to Evidence Code section 1109, for the sole reason of proving propensity, deprived him of equal

protection and due process. As Jeffries acknowledges,[17] the California Supreme Court and the Courts of Appeal have rejected these and similar claims, as we do now.

Evidence Code section 1108 is similar to Evidence Code section 1109, but addresses criminal actions in which the defendant is accused of a sexual offense. The California Supreme Court has rejected a challenge to Evidence Code section 1108 advanced on identical due process grounds as those Jeffries raises here in connection with Evidence Code section 1109. (See *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*).) Our high court reasoned that Evidence Code section 352, the application of which is expressly contemplated in both Evidence Code sections 1108 and 1109, serves as a built-in safeguard, granting the courts the authority to preclude the admission of evidence whenever the probative value of the evidence is substantially outweighed by its potential undue prejudicial effect. (*Falsetta*, at pp. 916-918.) Our high court has since adhered to its earlier holding in *Falsetta*. (See *People v. Loy* (2011) 52 Cal.4th 46, 60-61 [rejecting defendant's request to reconsider *Falsetta*, noting that defendant provided no good reason to do so].)

The Courts of Appeal, including this court, have uniformly followed the reasoning in *Falsetta* in determining that, like Evidence Code section 1108, Evidence Code section 1109 does not violate due process. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 529, and cases cited therein.) Similarly, the Courts of Appeal have rejected equal protection claims related to Evidence Code section 1109. (See *People v. Brown* (2011) 192 Cal.App.4th 1222, 1233, fn. 14; *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1311-1313.) We will not revisit these decisions here. Accordingly, we conclude that Jeffries's contention that Evidence Code section 1109 violates the guarantees of due process and equal protection is without merit.

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[17] Jeffries acknowledges that his arguments have been rejected by the relevant body of case law, but asserts them nonetheless in the interest of preservation.

DISPOSITION

The judgments are affirmed.

/s/
MURRAY, J.

We concur:

/s/
RAYE, P. J.

/s/
BUTZ, J.